No. 74-1619

In the Supreme Court of the United States

OCTOBER TERM, 1974

SUPREME COURT, U. S.
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FEDERAL POWER COMMISSION, PETITIONER

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Federal Power Commission petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra,* pp. 1a–40a) is not yet reported. The initial opinion (No. 623) of the Federal Power Commission (App. C, *infra,* pp. 42a–74a) and the opinion (No. 623–A) denying rehearing (App. D, *infra,* pp. 75a–76a) are reported at 48 FPC 40 and 48 FPC 371, respectively.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra,* p. 41a) was entered on February 5, 1975. On May 2, 1975, the Chief Justice extended the Commission's time for filing a petition for a writ of certiorari to and including June 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether the Federal Power Commission correctly determined it has no authority to consider coincidentally to the performance of its regulatory functions under the Federal Power Act, 16 U.S.C. 791a, *et seq.* and the Natural Gas Act, 15 U.S.C. 717, *et seq.* evidence that a regulatee is a demonstrated discriminator in its employment relations.

STATEMENT

1. On June 22, 1972, The National Association for the Advancement of Colored People, *et al.* (Petitioners) filed a petition seeking the issuance of a rule by the Commission which would regulate the employment practices of its regulatees. Attached to the petition was a proposed rule dealing with equal employment opportunity in the electric and gas utility industries (34a–40a). Petitioners claimed that the Commission had authority to regulate these matters under various sections of the Federal Power and the Natural Gas Acts, the two acts which the Commission admin-

isters. It was further contended that since there was a national policy against employment discrimination, the "public interest" standard, as used in various sections of these acts, necessarily includes that national policy. Finally, Petitioners urged that the Constitution required the Commission to regulate the employment practices of the regulatees, lest the Commission, due to the extent of its regulation under the acts, become a "partner" in private discriminatory behavior.

On July 11, 1972, the Commission issued Opinion No. 623 which dismissed the petition for lack of jurisdiction (pp. 42a–74a). The Commission believed that it lacked the requisite Congressional authority to promulgate equal employment opportunity regulations concerning the employment practices of those companies which it regulates. The Commission pointed out that there was nothing in the legislative history or the specific sections of either of these acts which would extend its regulatory authority into the internal labor management problems of its regulatees. To the suggestion that the "public interest" standard expanded its jurisdiction into this area, the Commission responded that Congress did not charge it with regulating all matters affecting the public welfare. Rather, the authority of the Commission extended only to those matters which had a "necessary nexus" to its economic regulatory activities or which inhered in the nature of the regulated industries and were thus reflected in the Federal Power and Natural Gas Acts. Finally, with regard to the Constitutional arguments, the Commission found that regulation under these

two acts did not significantly involve the federal government with any alleged discriminatory employment practices of its regulatees.

2. A petition for review was filed by the N.A.A.C.P., *et al.* Upon review, the Court of Appeals disagreed with the Commission's assessment of its jurisdiction and vacated and remanded the orders. The Court distinguished between "two kinds of jurisdiction" in evaluating the limitation of Commission authority. The first type of jurisdiction would be over employment discrimination *per se*—a power to "prescribe personnel practices in detail and to receive complaints, adjudicate them and punish directly infractions of those practices" (App. A, *infra,* p. 7a). The second would be a "power to take into account, in the performance of its regulatory functions, including licensing and rate review evidence that the regulatee is a demonstrated discriminator in its employment relations" (*id.* at p. 8a). The Court concluded that the Commission lacks the former type of authority but possesses the latter.

The Court recognized that the investigation into costs and the allocation of costs associated with employment discrimination was a "potentially quite complex question" (*id.* at p. 27a)[1] but nevertheless hypothesized "costs" could result from employment dis-

[1] The Court also recognized that the Commission staff was completely unfamiliar with the complex questions involving employment discrimination and had absolutely no expertise in this field. The Court acknowledged that the regulation of employment practices might impair the Commission's ability to discharge its express statutory responsibilities (*id.* at p. 9a).

crimination and directed the Commission to consider them in rendering decisions under the Federal Power and Natural Gas Acts.

The Court reasoned that the Commission's primary responsibility in protecting the consumer against exploitation could alternately be described as ensuring that no unnecessary or illegitimate costs would be passed on to consumers. And, the Court found, "[c]osts incurred by reason of a regulatee's choosing to practice racial discrimination are within the reach of that responsibility" (*id.* at p. 25a). The Court also ruled the Commission could deny a license or other similar authorization on the basis of an applicant's record in the area of employment discrimination. The Court reasoned that in the long run economic efficiency could be impaired by the failure to comply with all laws, including employment discrimination laws. From this, the Court concluded that the Commission was authorized to "regulate" employment practices and, to this end, could promulgate appropriate rules.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals extends the regulatory powers of the Commission into areas not intended by Congress to be regulated by the Commission. The Court of Appeals reasoned that inasmuch as the Commission's primary responsibility is to ensure that no unnecessary or illegitimate costs are passed on to consumers, the Commission could regulate "costs incurred by reason of a regulatee's choosing to practice racial discrimination" (App. A, *infra,*

p. 25a). However, merely because employment discrimination may have a "cost" this does not mean that the Commission must regulate employment discrimination. Costs are, of course, in issue in any rate proceeding just as compliance with the laws is a fair consideration in licensing proceedings, but it does not follow that the Commission may regulate the activities which generate those costs or to require affirmative actions before the Commission to comply with laws it is not mandated by Congress to enforce such as the preparation and filing of equal employment programs. Nevertheless, the Court's decision would have the Commission consider employment discrimination in the first instance in determining whether to issue a license or authorize a rate.

For instance, the Court found as proper areas of Commission consideration those parts of the proposed rule providing for the routine filing with the Commission of an EEO–1 statement (*id.* at p. 31a, 38a) and providing for intervention by any person who believes himself subjected to employment discrimination (not one who can demonstrate the costs which have been incurred because of employment discrimination and who will be subjected to those costs), (*id.* at p. 31a, 39a).

Additionally, the Court's decision would require the Commission in ruling on all applications to give material consideration if not by general rulemaking then on a case by case basis (*id.* at p. 33a, note) to the following matters which the proposed rule would require from each regulatee: to establish and file with the Commission a written equal employment opportunity

program (*id.* at pp. 31a, 40a, 36a–38a); to file with all authorization requests a report on the application and effect of a regulatee's employment program upon his employment applications, hiring, and promotions; and to report any employment complaints filed (*id.* at pp. 31a, 40a, 38a). Rather than having the necessary nexus with the Commission's regulatory functions those matters go to the regulation of employment discrimination for its own sake. The Commission believes it is not and should not be required by law to consider these matters. In no way do these matters normally relate to the central functions of the Commission. The Court has confused the consideration of whether to allow certain costs in ratemaking, however incurred, with the consideration and regulation of employment discrimination affecting costs.

Finally, the thrust of the Court's decision is far reaching and potentially burdensome upon the activities of other regulatory agencies who must now seemingly consider evidence of employment discrimination by their regulatees in the first instance without any initial demonstrable showing of cost impact or other impact on operations. Further, if left standing, the decision could be extended for the proposition that a regulatory agency may be required to undertake duplicative regulation in vast areas of business activities which Congress had not intended. Regulation may be required by the decision where the merest thread of interrelationship exists between the activities of the regulatees and the duty of the agencies.

For instance, certainly Congress did not intend this Commission to regulate the area of labor management relations and to collect evidence of a utility's failure to comply with regulations of the National Labor Relations Board or to permit interventions of individuals to provide evidence that the tax laws and Internal Revenue Service regulations regarding withholding of taxes were violated so that the Commission could penalize the utility by lowering its rates if the Commission makes an independent finding the regulations of those agencies have been violated. It is cost evidence which is the proper subject for Commission consideration, but not evidence in the first instance on the question of whether the utility is in compliance with the rules of the NLRB or the IRS.

In this regard, the Court's holding is inconsistent with its finding that Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972,[2] do not require the Commission to concern itself with employment discrimination. Indeed, the Court concluded that Congress specifically desired not to diffuse authority over employment discrimination and accordingly centralized responsibility in the Equal Employment Opportunity Commission (*id.* at p. 21a).

2. The decision of the Court of Appeals, if not overturned, would impose an impractical burden on the Commission and would severely impair the ability of the Commission to discharge its statutory responsibili-

[2] 42 U.S.C. §2000e (1970).

ties under the Federal Power Act, 16 U.S.C. 791a, *et seq.* and the Natural Gas Act, 15 U.S.C. 717 *et seq.* The decision would encourage parties in litigation at the Commission to seek the introduction of a large mass of material and issues unrelated to the Commission's area of expertise and, more importantly, not directly related to utility costs or ability to provide service, but concerned with their compliance with the equal opportunity employment requirements of other laws and other agencies.

The decision below found that there is nothing in either the legislative histories or the specific sections of the Federal Power or Natural Gas Acts which would independently authorize the Commission to regulate the employment practices of its regulatees (App. A, *infra,* pp. 10a–15a). The Court of Appeals also recognized that the staff of the Commission has absolutely no expertise in the field of employment discrimination and that the obligation to regulate employment practices could have a deleterious effect upon the Commission's statutory responsibilities (*id.* at p. 9a). In spite of these findings, the Court *sua sponte* concluded that the Commission is authorized to regulate employment practices (*id.* at p. 26a), and affirmatively required the Commission to consider evidence of employment discrimination either in rulemaking proceedings or at the very least on a case-by-case basis as they are raised (*id.* at p. 33a, note).

If there is nothing in either the legislative histories or specific sections of the Federal Power or Natural Gas Acts which would authorize the Commission to

regulate the internal employment policies of its regulatees, then a court of appeals cannot independently create such authority. If the Commission is to become a forum for the airing of employment discrimination disputes, that necessitates legislation by Congress and not adjudication by a court.

The Court of Appeals erred in judicially extending to the Commission the complex and time consuming burden of regulating employment discrimination that has already been delegated by Congress to other agencies of government by effectively requiring that evidence of employment practices be considered in all Commission proceedings. The Commission has concluded that the timely discharge of its statutory responsibilities as expressly mandated by Congress under the Federal Power and Natural Gas Acts would be severely hampered if in addition it must attempt to comply with the far reaching holding of the Court of Appeals.

The Commission's rate jurisdiction extends to about 200 public utilities selling electric energy at wholesale in interstate commerce under the Federal Power Act. In fiscal year 1974, 2,777 electric rate filings were received and a total of 173 electric rate cases were involved in formal litigation during that period.[3] Commission jurisdiction also applies to approximately 300 hydro-electric licensees. About 109 applications concerning their projects were received during fiscal

[3] FPC Budget Estimates, Justification to Congress, Fiscal Year 1976, pp. 4–6, 4–8.

year 1974,[4] and 25 cases were in litigation during the period.[5]

The Commission's jurisdiction under the Natural Gas Act extends to approximately 6,200 natural gas producers, of which about 100 are large producers each selling by definition more than 10 billion cubic feet per year. These producers filed with the Commission a total of 6,299 rate increases in 224 dockets in fiscal year 1974.[6] Additionally, natural gas producers filed 1,457 certificate and abandonment applications during fiscal year 1974.[7]

Under the Natural Gas Act, the Commission's regulation of national gas producers is no longer accomplished on an individual cost of service basis. Rather, nationwide rate ceilings for wellhead sales have been established and the Commission is not concerned with an individual company's cost of doing business. See *Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 282 (1974). If the Commission is required to investigate the employment practices of individual producers the potential burden of reviewing them for the several thousand producers individually would be insurmountable. Moreover, individual review would be wholly incompatible with the framework of the nation-wide or area-wide means of regulating producer rates which have been judicially approved and which are a necessary methodology in the Commission's efforts to alleviate the nation's critical natural gas

[4] *Id.* at pp. 2–6 to 2–9.

[5] *Id.* at pp. 2–14.

[6] FPC 1974 Annual Report to Congress, Table 34, p. 118.

[7] *Id.*, Table 35, at p. 119.

supply shortage. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 755–58 (1968).

The Commission also has certificate and rate jurisdiction over 119 interstate natural gas pipelines. In fiscal year 1974 they filed 300 rate increase applications[8] and 457 certificate applications.[9] A total of 147 pipeline rate cases and 155 pipeline certificate cases were in litigation during fiscal year 1974.[10] The additional burdens of considering evidence of employment discrimination in the litigated cases alone are apparent.

The Commission lacks both the staff and the technical expertise to investigate and quantify the hypothetical costs of employment discrimination which the Court found pertinent to the discharge of the Commission's regulatory responsibilities. For instance, the Commission is not equipped to determine the purpose for which a "strike, demonstration, or boycott" against a regulatee was initiated or to calculate the cost of lost production resulting from these activities (id. at 25a–26a); nor do they relate to the nexus of the Commission's functions. Additionally, the Commission has neither the facilities nor the technical acumen to determine valid "labor costs" for a regulatee due to the elimination from the prospective labor force of those who are discriminated against (*id.* at p. 26a). And, certainly, the Commission possesses no special competence to devise a formula which would measure the economic "costs of inefficiency" in the work force

[8] *Id.*, Table 36, at p. 119.

[9] FPC Budget Estimates, Justification to Congress, Fiscal Year 1976, p. 5–9.

[10] *Id.* at pp. 5–14 and 5–12.

allegedly brought about by the psychological impact of employment discrimination (*ibid.*). Even if the Commission were to collect such data and somehow quantify it, it will be exceedingly difficult to relate this information, in any meaningful way, to its regulatory decisions under the Federal Power and Natural Gas Acts.

In light of the imposition of this onerous and futile burden, the Commission believes that unless the decision is overturned it would be seriously hampered in effectively and responsibly regulating public utilities, licensees, and natural gas companies in the public interest pursuant to the existing congressional mandates of the Federal Power Act and the Natural Gas Act, all to the ultimate detriment of the nation's consumers of electric energy and natural gas.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Federal Power Commission.

JUNE 1975.

I authorize the filing of this petition.

ROBERT H. BORK,
Solicitor General.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1959

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

THE FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of Order of
The Federal Power Commission

Decided February 5, 1975

Before BAZELON, *Chief Judge*, and MCGOWAN and MACKINNON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MCGOWAN.

MCGOWAN, *Circuit Judge*: This petition for direct review of an order of the Federal Power Commission raises a question as to the precise scope of the regulatory authority vested in that agency by the Congress. It concerns in particular a request made of the Commission, and dismissed by it for lack of jurisdiction, to initiate rule making proceedings in respect of asserted employment discrimination by its regulatees. Because of the confused and contradictory manner in which the important jurisdictional issues involved in this case are presented by all parties to this appeal, we vacate the Commission's order of dismissal, and remand the case for further consideration in light of this opinion.

I

Petitioners are a number of organizations concerned with advancing the interests of black, Spanish surnamed, native, and female Americans. Charging widespread discrimination in the employment of these groups by natural gas and electric utility companies, they petitioned the Commission for "the issuance of a rule requiring equal employment opportunity and nondiscrimination in the employment practices of its regulatees," [1] and attached to their petition a "proposed rule," which we append to this opinion. We recount its operative provisions.

Section 2 declares that equal employment opportunity will be considered an element of the "public interest," a

[1] Petition of NAACP, et al; FPC Docket No. R-447, JA 1.

criterion by which the Commission must make many of its rate making and licensing decisions. Section 3 details the substantive duties of regulatees not to discriminate in any employment practice on the basis of race, color, religion, sex or national origin. Sections 4 and 5 impose on regulatees the duty to devise and to implement affirmative "equal employment opportunity programs," the general purpose of which is to involve every regulatee in a "continuing campaign to exclude every form of prejudice or discrimination . . . from its personnel policies and practices," and the specific contents of which are to include such measures as the active recruitment of minority and female employees through advertisement in media having significant circulation among those groups, the avoidance of selection techniques and tests that have the effect of disadvantaging minority groups and females, and the publication to the regulatee's management staff and employees of a rigid anti-discrimination policy.

Section 6 of the proposed rule requires each regulatee to file annually with the Commission a copy of the "EEO-1" form which it already must file annually with the United States Equal Employment Opportunity Commission. Section 7 makes it a necesary part of each regulatee's application for a rate change, license or other necessary Commission approval that a report be submitted on the nature and success of the regulatee's affirmative "equal employment opportunity program" and on any complaints of employment discrimination that have been made against the regulatee. Section 9 obligates the Commission to entertain individual complaints of employment discrimination by regulatees, and to conduct hearings and issue decisions and orders pursuant to its existing procedural regulations.[2]

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[2] Such of those complaints as claim violations of any provision of Title VII of the Civil Rights Act of 1964 may be referred to the Equal Employment Opportunity Commission.

The proposed rule's section 10 authorizes intervention by complainants of employment discrimination in any rate making or licensing proceeding involving the regulatee complained against. Section 11 reinforces section 2, described above, by specifying that a regulatee's record of compliance with the proposed rule will be given "material consideration" by the Commission when it passes on any request by that regulatee for a rate change, license, or other necessary Commission approval, with Commission action on such requests being denied or conditioned accordingly. Section 14 imposes, for violation of the proposed rule, the usual $500-a-day fine for violation of Commission rules.

The response of the Commission was to treat the petition for rule making as one for a declaratory order, and to issue such an order, the substance of which was a refusal to initiate the requested rule making on the ground that the Commission had "no jurisdiction to adopt such a rule." [3] When they requested a rehearing by the Commission, petitioners appended a letter supporting their position from the Chairman of the Equal Employment Opportunity Commission, *id.* at 90, which agency

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[3] JA 56, 77. We note in passing that there is some uncertainty as to what exactly is before us for review. We are confronted with what is styled a declaratory order, though why the Commission thought this the proper medium through which to assert a jurisdictional barrier to the requested rule making is not clear to us. The procedural waters have been further muddied by the wording of the Commission's formal order, which dismissed the petition "as described above," *id.* at 77, the Commission having treated the petition as one for a declaratory order. It might therefore be said that what we are confronted with is not even a declaratory order refusing to initiate rule making, but a declaratory order refusing to issue a requested declaratory order. We pass over these ambiguities, however, preferring to treat the Commission as having done exactly what in substance it did do, namely, to refuse on jurisdictional grounds to initiate the requested rule making.

has also filed an *amicus* brief with this court. The Comcission denied the petition for rehearing as "setting forth no new facts or principles of law," *id.* at 93, and the way was thus cleared for this direct review proceeding.

A close analysis of the procedural posture of this appeal reveals a double ambiguity. By requesting "*a rule* requiring equal employment opportunity and nondiscrimination in . . . employment practices," the petitioners left unclear whether they were asking for their proposed rule and no other, or merely for a rule making proceeding on the subject of employment discrimination generally, with the proposed rule perhaps serving only as a model or point of departure. By asserting its lack of jurisdiction to adopt "*such a rule*," the Commission in turn left unclear which of these requests it was denying its jurisdiction to grant. We do not know whether its order asserted a lack of jurisdiction to adopt (1) the specific proposed rule, or (2) *any* rule relating to employment discrimination by regulatees.

The ambiguity is unfortunately not resolved by examining the positions taken by the parties in the record and in their briefs. In their petition for rule making, petitioners first proposed the adoption of "a rule" relating to employment discrimination, but then went on to ask the Commission more expansively to "[p]rescribe *regulations* prohibiting discrimination . . . and assuring equal opportunity in the employment practices of its regulatees." (Emphasis added.) *Id.* at 3. The Commission's opinion denying the rule making petition, although it devoted considerable attention to the jurisdictional problems raised by certain aspects of the proposed rule in particular and concluded by denying its jurisdiction to adopt "such a rule," stated at an earlier point that "[t]he Commission lacks the legal authority to promulgate equal employment opportunity *regulations* . . . because its lacks the requisite delegation of Congressional

authority to act *in that area*." (Emphasis added.) *Id.* at 57, 75-77.

The confusion persists in the briefs filed in this court. In footnote 87 (at p. 54) of their brief, petitioners respond to the Commission's objections to particular aspects of the proposed rule, one such objection being that it would result in public disclosure of information protected from such disclosure by the Civil Rights Act. The petitioners' answer that "[w]e are confident that sufficient expertise and competence exists at the Commission to devise a rule against employment discrimination that would be effective and in harmony with other laws and regulations," suggests that petitioners do not view themselves as having asked for and been denied a specific proposed rule but rather rule making in general. On the other hand, they conclude their brief in this court by asking "that the Federal Power Commission be directed to proceed with utmost dispatch in *issuing the rule requested*." (Emphasis added.) *Id.* at 54, 68-69.

Similarly, the Commission in its brief (at 3-4) states in one sentence that it "dismissed the petition for lack of jurisdiction to adopt the requested rule," and in the next sentence states that it "denied the requested relief because, in its view, it lacked the requisite Congressional authority to promulgate equal employment opportunity regulations. . . ." Further, there are internal contradictions in the Commission's brief. It states the issue to be whether it has any jurisdiction, in the course of discharging its regulatory responsibilities, to take the existence of proven employment discrimination into account, and broadly argues that it does not. However, at one point in its brief (at 30) the Commission says:

> . . . [I]t will suffice to say that no costs can be passed on to the ultimate consumer without the approval of the Commission. If any party wishes to challenge the propriety of certain costs, *e.g.*, those

> incurred through discriminatory employment practices, he is free to intervene and make his position known in the appropriate rate proceeding.

It is obvious that a concession of this kind is not compatible with any flat statement that the Commission has no authority to consider the fact of employment discrimination in its public interest determinations.

In its *amicus* brief the EEOC states the "Question Presented" as that of

> Whether the Federal Power Commission in exercising its public responsibilities has the authority to consider the discriminatory employment practices of its regulatees, or whether it must ignore such discrimination on the basis of Race, sex, or national origin, no matter how blatant or wide-spread?

It indicates generally in its brief that the issue is whether the FPC has jurisdiction to adopt *some* rules relating to employment discrimination, stating at one point (at 4-5) that "we do not argue that the Power Commission is required to consider every complaint of discrimination against a utility which it regulates . . . [but only that it cannot] ignore widespread general discrimination. . . ."

It is possible that the parties are closer together than they think. Whether this is true or not, the case is before us on representations by both sides which, on close analysis, suggest that the parties may be talking past each other. We cannot ignore the fact that this confusion exists, for it is crucial to our disposition, as will become clear from the discussion hereinafter of the apparent boundaries of the Commission's jurisdiction. From this point forward it is important to distinguish between two kinds of jurisdiction: One—to which the proposed rule extends—embraces power on the part of the Commission to prescribe personnel practices in detail and to receive complaints, adjudicate them, and punish directly infractions of those practices. The other—which

even the Commission appears to contemplate may exist—is power to take into account, in the performance of its regulatory functions, including licensing and rate review, evidence that the regulatee is a demonstrated discriminator in its employment relations.

II

Petitioners assert first a statutory and then a constitutional basis for their claims of broad Commission jurisdiction over the employment practices of regulatees.[4] We shall consider these in the same order, concluding that the Commision is neither empowered nor required to adopt the rule as proposed, but that it does possess jurisdiction of the more limited kind conceded by it in its brief.

There is one preliminary observation to be made. In arguing for their proposed rule, petitioners emphasize the great importance of the fight against employment discrimination. While reiterating our belief in that importance, we must also note the limited relevance of that belief to this appeal. For one thing, Congress need not be accused of slighting the importance of achieving equal employment opportunity merely because of a decision

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[4] Petitioners' brief contains a third section in which arguments are made that (1) no other federal law "preempts" the Commission from acting to proscribe employment discrimination by regulatees and (2) the Commission's doing so would effectively promote the national policy against such discrimination. Br. 45-54. A claim of "preemption," if it is at all distinct from the assertion that statutory authority is simply lacking, adds only the notion that such authority might once have existed and been withdrawn. In fact no such distinct contention appears to have been made by the Commission, and, accordingly, we do not treat the matter separately. Neither do we treat separately the alleged potential efficacy of the Commission in combatting employment discrimination, of which the only apparent relevance to this appeal is the possible inference that Congress should not be considered to have eschewed the use of so powerful a weapon.

on its part that this task is not one it chose to assign to the Federal Power Commission. There are good reasons why Congress might have reached such a decision. The goal itself might have been thought better served by centralizing responsibility for its achievement (in the Justice Department and the Equal Employment Opportunity Commission, for example) rather than by diffusing it among many and thus suffering a loss in the degree of accountability and a gain in the number of jurisdictional overlaps and conflicts.

More important, Congress may have felt that other significant goals would be inadequately served if the attentions of the agencies set up to pursue them were divided. The Commission's principal task of passing on statutorily specified license and rate applications is prodigious.[5] To perform it, a staff has been built up of specialists in the technical aspects of gas and electric power production and distribution. The unfamiliar problems of employment discrimination regulation might divert an inordinate amount of their energies and skills from the ends to which these are most productively applied.

This discussion of the merits of combining in one agency the responsibilities for insuring efficient power pro-

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[5] The dimensions of the task are suggested by a partial list of applications to, and actions by, the Commission during fiscal 1973: 56 wholesale electric rate increase applications; 11 electric company sale and consolidation applications (all disposed of), 75 electric company securities issuance applications (all disposed of); 116 electric power project license and permit applications (90 disposed of, leaving 529 pending); 215 pipeline rate increase applications; 280 pipeline construction certificate applications (212 disposed of, leaving 214 pending); 6,844 gas producer rate increase applications; 1,383 gas producer certificate applications (955 disposed of, leaving 2,059 pending); 216 gas producer abandonment applications (171 disposed of, leaving 287 pending). FPC, 1973 ANNUAL REPORT 19, 20, 41, 56, 58, 59, 60 (1973).

duction and for curtailing employment discrimination is obviously much abbreviated. We do not prolong it, however, for the reason that, beyond assuring ourselves that it would not be unreasonable for Congress to divide these responsibilities or to allocate their sharing in differing manners and proportions, we are not concerned with why Congress may have done so, but whether it did; and to that question we now turn.

A. *The Relevant Statutes.*

1. *Federal Water Power Act.*

The Commission was first brought into being by the Federal Water Power Act of 1920.[6] The principal powers delegated to it by that Act, along with the stated criteria for their exercise, are as follows: to issue licenses, with appropriate conditions, for "necessary or convenient" navigation and power projects on Federal waterways;[7] to recommend that "the development of any water resource for public purposes . . . be undertaken by the United States itself," refusing to renew existing licenses on that account;[8] to require modification of proposed projects in order to effect a "comprehensive plan" for the use of Federal waterways in commerce, power generation, and "other beneficial public uses, including recreational purposes";[9] to regulate the operation of licensed projects "for the protection of life, health, and property";[10] in the absence of state regulation, to regulate security issuances by licensees, and also to set "reason-

[6] 41 Stat. 1063 (June 10, 1920), *as amended* 16 U.S.C. §§ 791-823 (1970).

[7] 16 U.S.C. §§ 797(e), 799, 817 (1970).

[8] *Id.* §§ 800(b) and (c), 807.

[9] *Id.* § 803(a).

[10] *Id.* § 803(e).

able, non-discriminatory, and just" rates for interstate sales of power from licensed projects.[11]

On its face, the Act thus displays a primary congressional concern for the orderly and coordinated development of water resources, and also for interstitial Federal regulation of the sale of power derived therefrom. Otherwise, the only expressed concern with the internal operations of licensees relates to health and safety features of licensed projects. Broad references to the "public interest," on which petitioners place such great emphasis, are rare in the Act. Where they do occur, moreover, they strongly suggest by their contexts that what is meant is not the public interest generally, but the public's interest in the optimal use of the waterways. Thus, Section 4 requires that contemplated improvements in waterways be "desirable and justified in the public interest *for the purpose of improving or developing a waterway* . . . (emphasis added)."[12]

The legislative history of the Act holds few surprises. It reveals a Congress whose attention was steadily fixed upon two principal objectives: to exploit the hydro-electric resources of a nation that even then was energy-deficient,[13] and to substitute for its earlier piecemeal approach to the problem a method of comprehensive planning which would accomplish, among other things, the conservation of natural resources.[14]

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[11] *Id.* § 813.

[12] *Id.* § 797(e). *See also id.* §§ 797(g), 800(a).

[13] *See* H. R. REP. NO. 61, 66th Cong., 1st Sess. 4-5 (1919); S. REP. NO. 180, 66th Cong., 1st Sess. 2-3 (1919).

[14] *See* H. R. REP. NO. 61, supra note 36, at 2-3; Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 613 (2d Cir. 1965). *See also* Udall v. FPC, 387 U.S. 428 (1967).

2. *Federal Power Act.*

The Commission's authority was substantially broadened by the Federal Power Act, enacted as Title II of the Public Utility Act of 1935.[15] Among its newly delegated powers were the following: to order such interconnections of electric power transmission facilities, setting such terms and conditions for the same, as are "necessary or appropriate in the public interest";[16] to approve such asset sales and consolidations of interstate electric power companies as are "consistent with the public interest";[17] to approve such securities issuances by those companies as are "compatible with the public interest" and "consistent with the proper performance of service . . . as a public utility";[18] to determine "just and reasonable" rates for interstate sales and transmissions of electric power;[19] and to order that "proper, adequate or sufficient" interstate power service be rendered.[20]

The Act's preamble echoes the generality of the foregoing quoted phrases, declaring that the sale and transmission of electric power are "affected with the public interest," federal regulation of interstate aspects being "necessary in the public interest."[21] The statute itself nowhere defines the "public interest," but instead leaves the precise ambit of the Commission's concern uncertain. Of the Commission's primary task there is no doubt, however, and that is to guard the consumer from exploita-

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[15] 49 Stat. 803, 838 (Aug. 26, 1935), *as codified* 16 U.S.C. §§ 824-25 (1970).

[16] 16 U.S.C. § 824(a) (1970).

[17] *Id.* § 824(b).

[18] *Id.* § 824(e).

[19] *Id.* § 824(f).

[20] *Id.* § 824(f).

[21] *Id.* § 824(a).

tion by non-competitive electric power companies. The Act itself speaks of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy." [22] It was passed in conjunction with the Public Utility Holding Company Act of 1935, whose stated policy was to undo the effects of the holding companies' exercising undue control over the power industry, one of these effects being excessive charges to subsidiaries because of "an absence of arm's-length bargaining [and] restraint of free and independent competition." [23] Congress's central concern with exploitation is of course reflected in the statute's emphasis on just and reasonable prices, as well as by its frequent references to the financial and accounting aspects of electric company operations.[24] The legislative history of the Act adds little to our understanding. It reveals that Congress's goal was, once again, the "planned coordination of the facilities of the industry which alone can produce an abundance of electricity at the lowest possible price." [25]

3. *Natural Gas Act.*

The Natural Gas Act of 1938 [26] further empowered the Commission, in part: to approve imports and exports of natural gas unless it finds that these "will not be in

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[22] *Id.* § 824(a). *See also id.* § 825(s) (government-produced power to be disposed of "in such a manner as to encourage the most widespread use thereof at the lowest possible rates to consumers").

[23] Public Utility Holding Company Act of 1935 § 1(b)(2), 15 U.S.C. § 79a(b)(2) (1970).

[24] *See* 16 U.S.C. §§ 824g, 824h(b), 825(a), 825a, 825c, 825h.

[25] S. REP. No. 621, 74th Cong., 1st Sess. 17 (1935).

[26] 52 Stat. 821 (June 21, 1938), *as codified*, 15 U.S.C. § 717 *et seq.* (1970).

the public interest";[27] to set "just and reasonable" rates for the interstate transportation and sale of natural gas;[28] to order such expansions and interconnections of natural gas transportation facilities as are "in the public interest" and do not impose an "undue burden";[29] to disallow abandonments except as the "public convenience and necessity permit[s]";[30] and to license interstate transportation and sale of gas by reference to the "public convenience and necessity."[31]

As in the case of the Federal Power Act, the statute's preamble declares that interstate gas operations are "affected with a public interest" and must "in the public interest" be regulated, but leaves the exact content of these terms in doubt. Again, however, there is no question that the exploitation of the gas consumer was uppermost in Congress's mind. The statute begins with a reference to certain reports made by the Federal Trade Commission, the central conclusion of which had been that anticompetitive practices and overconcentration of control in the natural gas industry were leading to the payment of excessive prices by the consumer.[32] The statute evinces the same concern for "just and reasonable" rates as does the Federal Power Act, with an added preference for decreasing rather than increasing those rates,[33] and

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[27] 15 U.S.C. § 717b (1970).

[28] *Id.* § 717c and d.

[29] *Id.* § 717f(a).

[30] *Id.* § 717f(b).

[31] *Id.* § 717f(e).

[32] *See* Federal Trade Commission, FINAL REPORT TO THE SENATE PURSUANT TO S. RES. NO. 83, 70th Cong., 1st Sess. S. DOC. NO. 92, Pt. 84-A, 70th Cong., 1st Sess. (1936) at 581-617; FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944).

[33] The Commission may decrease but not increase rates on its own motion. 15 U.S.C. § 717d (1970).

there is the same frequency of reference to the financial and accounting aspects of gas company operations.[34]

The elements of the "public interest" are never detailed in the congressional debates and reports, but there are innumerable references to the problem of consumer exploitation.[35] Indeed, the Act as originally passed stated its primary concern with this problem in as many words:

> . . . [I]t [is] the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.[36]

The quoted passage was lost to later amendments, but these were not intended as revisions either of Congress's objective or of the Commission's charter.[37]

B. *FPC Regulation of Employment Discrimination Per Se.*

The more extensive of the two kinds of jurisdiction described above—that consistent with the adoption of the petitioners' proposed rule—would in our view necessarily entail a power on the Commission's part to regulate employment discrimination *per se*, a power, in other words, to act to curtail employment discrimination merely for the sake of seeing that practice curtailed. The Commission could only have such power, of course, if the cur-

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[34] *See* 15 U.S.C. §§ 717h, 717, 717m(b), 717o, 717p(b).

[35] *See* S. REP. No. 1162, 75th Cong., 1st Sess. (1937); H. R. REP. No. 709, 75th Cong., 1st Sess. (1937); 81 Cong. Rec. 6720-33, 9314-17 (1937).

[36] Natural Gas Act § 7(c), 52 Stat. 821, 825 (1938) *as amended*, 15 U.S.C. 717f (1970).

[37] Act of Feb. 7, 1942, 56 Stat. 83 (1942), as codified 15 U.S.C. § 717f(c)-(h). *See also* H. R. REP. No. 1290, 77th Cong., 1st Sess. (1941).

tailment of employment discrimination were itself among the Commission's statutorily defined objectives. To judge the validity of the proposed rule, therefore, we must first ask whether the Congress did indeed entrust to the Commission this particular responsibility.

Judicial precedent suggests that the Commission's responsibilities are limited to those that we have identified above in discussing the statutes and their histories. The courts have, for example, described the Federal Water Power Act as "the outgrowth of a widely supported effort on the part of conservationists," *Scenic Hudson Preservation Conference v. FPC*, 334 F.2d 608, 613 (2d Cir. 1965), and have stated that a "major purpose of the whole [Federal Power] Act is to protect consumers against excessive prices." *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952). It has been said that the Commission's task under the Natural Gas Act is to effect "a balancing of the investor and the consumer interests," on the one hand, to see that "the return to the equity owner [is] sufficient to maintain confidence in the financial success of the enterprise, so as to maintain its credit and attract capital," and, on the other, to "protect consumers against exploitation at the hands of natural gas companies." *FPC v. Hope Natural Gas*, 320 U.S. 591, 603, 610 (1944).[38]

A concise description of the principal objectives of Commission activity must therefore be the following: first, to oversee the orderly development of water power and other natural resources, and, second, to bring about the production of power in the greatest possible quantity and at the lowest possible cost to the consumer in the long run—in the economist's terms, to insure the efficient performance of an industry in which the normal forces

[38] *See also* Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, 388 (1959) ("purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumer").

of competition are for one reason or another not equal to the task.[39]

Petitioners maintain, however, that the Commission may properly concern itself with employment discrimination *per se* under the statutory command to the Commission to regulate "in the public interest," and by similar vague criteria. We turn, then, to the question of the proper interpretation of these criteria, and thereafter to a consideration of whether our views are consistent with prior decisions of analogous questions of agency jurisdiction.

1. *The "Public Interest."*

The Supreme Court has stated that the words "public interest" do not constitute a "mere general reference to the general welfare, without any standard to guide determinations." Rather the Court, in interpreting the Interstate Commerce Act, insisted that "the term 'public interest' . . . has direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and appropriate provision and best use of transportation facilities . . . ." *New York Central Securities Co. v. United States*, 287 U.S. 12, 24 (1932).

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[39] A particularly lucid elaboration of this latter function was given by Judge Wright in Northern Natural Gas v. FPC, 399 F.2d 953, 959 (D.C. Cir. 1968):

> . . . [The] basic goal of direct governmental regulation through administrative bodies and the goal of individual government regulation through the antitrust laws is the same—to achieve the most efficient allocation of resources. For instance, whether a regulatory body is dictating the selling price or that price is dictated by a market free from unreasonable restraints of trade, the desired result is to establish a selling price which covers costs plus a reasonable return on capital . . . .

See also Lynchburg Gas Co. v. FPC, 336 F.2d 942, 949-50 (D.C.Cir. 1964).

As was succinctly said in *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944), also involving the powers of the Interstate Commerce Commission, its primary statutory objective of insuring efficient transportation service is "the Commission's guide to the public interest." *Id.* at 82.

We ourselves noted in *Alabama Electric Cooperative Inc. v. SEC*, 353 F.2d 905, 907 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 968 (1966), that

> "[w]ords like 'public interest' . . . , though of wide generality, take their meaning from the substantive provisions and purposes of the Act."

And in a recent case where the jurisdiction of the FPC in particular was at issue, we declared that:

> A particular statute may have such a setting that, on consideration of its legislative history, the nature of the agency, and breadth of responsibility involved, and other material factors, a court may come to the conclusion that though its public interest language is broad its meaning in context warrants a relatively restricted reading.

City of Lafayette v. SEC, 454 F.2d 941, 948 (D.C. Cir. 1971), *aff'd sub nom. Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973).[40]

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[40] *See also* National Broadcasting Co. v. United States, 319 U.S. 190, 216, 219 (1943) (FCC not empowered by "public interest" criteria to act upon "generalities unrelated to the living problems of radio communication"); Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933) ("public interest" to be interpreted in light of "its context . . . the nature of radio transmission and reception, [and] . . . the scope, character, and quality of service"); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968) ("Especially with First Amendment issues lurking in the background, the 'public interest' is too vague a criterion for administrative action unless it is narrowed by defineable standards."), *cert. denied*, 396 U.S. 842 (1969); City of

We must conclude, therefore, that Congress has not charged the Commission with advancing *all* public interests, but only the public's interest in having the particular mandates of the Commission carried out, its interest, in other words, in the conservation of natural resources and the enjoyment of cheap and plentiful electricity and natural gas.

2. *Related Jurisdictional Issues.*

a. *The FPC and Antitrust Considerations.*

Much is made by petitioners of our numerous holdings that the Commission may, and in some cases must, take into account the anticompetitive activities of regulatees as well as the anticompetitive effects of proposed Commission actions. *See, e.g., City of Lafayette* v. *SEC, supra; Northern Natural Gas Co.* v. *FPC*, 399 F.2d 953 (D.C.Cir. 1968); *City of Pittsburgh* v. *FPC*, 237 F.2d 741 (D.C.Cir. 1956).[41] These do not, however, establish that the content of the "public interest" criterion is generally supplied by other national policies and laws. *Some* such policies and laws are surely relevant, but not simply because they exist. They are relevant because their objectives "can be related to the objectives of the statute administered by the agency." *City of Chicago* v. *FPC*, 385 F.2d 629, 635 (D.C.Cir. 1967). Recalling the primary objectives of the Commission as we have described

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Chicago v. FPC, 385 F.2d 629 (D.C. Cir. 1967) (agency may consider congressional objectives expressed in other legislation "assuming they can be related to the objectives of the statute administered by the agency"), *cert. denied*, 390 U.S. 945 (1968).

[41] *See also* Denver & Rio Grande Western R. Co. v. United States, 387 U.S. 485, 492-493, (1967); California v. FPC, 369 U.S. 482, 484-485 (1962); United States v. Borden Co., 308 U.S. 188, 198-199 (1939); Lynchburg Gas Co. v. FPC, 336 F.2d 942, 946, 949-950 (D.C. Cir. 1964); Pennsylvania Water & Power Co. v. FPC, 193 F.2d 230, 235 (D.C. Cir. 1951), *aff'd.* 343 U.S. 414 (1952).

them above, one would be hard put to think of a matter of more direct and proper concern to the Commission than the state of competition in the regulated industry. By doing whatever is within its power to enhance that competition, the Commission serves the same objective as it does by direct regulation of price: indeed, Commission decisions affecting the structure of the power industry could scarcely be made rationally without regard to the impact they will have on the competitive climate.

If express statutory authority to consider antitrust policies were needed, moreover, it would not be lacking. Although the Commission is nowhere empowered to enforce the antitrust laws as such,[42] it is authorized by the Natural Gas Act to transmit evidence of apparent violations of those laws to the Attorney General. 15 U.S.C. § 717s(a) (1970). The Federal Water Power Act specifies, moreover, that project licenses are to be issued by the Commission with the condition that:

> Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

16 U.S.C. § 803(h) (1970). *See also Northern Natural Gas* v. *FPC*, 399 F.2d 953, 959-60 (D.C.Cir. 1968).

b. *The FPC and Environmental Considerations.*

It has also been held that environmental considerations are the proper concern of the Commission. *See, e.g., Udall* v. *FPC*, 387 U.S. 428 (1967); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965). But, as we have seen, the Commission's explicit mandate includes the preservation as well as the exploita-

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[42] *Compare* 15 U.S.C. § 21(a) (1970) (enumerating other agencies empowered to enforce the Clayton Act).

tion of water resources, the Water Power Act of 1920 having been "the outgrowth of a widely supported effort on the part of conservationists." *Scenic Hudson Preservation Conference* v. *FPC*, *supra* at 613. The Act itself instructs the Commission to consider the "recreational purposes" to which water resources might be put. 16 U.S.C. § 803(a) (1970). Finally, environmental considerations have been expressly made the business of all Federal agencies by the National Environmental Policy Act of 1970. *See* 42 U.S.C. § 4332(A)-(H) (1970); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

It is convenient at this point to mention Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972,[43] counterparts of NEPA in the field of employment discrimination. In thus specifically legislating in the area of equal employment opportunity, Congress did not in our view curtail any agency's existing authority in that area, but there are several other things it did not do. It did not, in the manner of NEPA, explicitly enjoin every federal agency to concern itself with employment discrimination; to the contrary, it centralized responsibility for such matters in the Equal Employment Opportunity Commission. Strong evidence of Congress's specific desire not to diffuse authority over employment discrimination among federal agencies other than the EEOC is also found in section 604 of Title VI of the Civil Rights Act of 1964.[44] All federal agencies are directed by that Title to administer contracts and subsidies in such a way as to insure that discrimination is not practiced "under any program or activity receiving Federal financial assistance." Section 604 provides, however, that:

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[43] 42 U.S.C. § 2000e (1970).

[44] 42 U.S.C. § 2000d *et seq.* (1970).

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. 2000d-3 (1970).

c. *The FCC and Employment Discrimination.*

Our attention is directed to the fact that the Federal Communications Commission has adopted regulations governing the employment practices of its regulatees. *See* 47 CFR §§ 21.307, 76.311. While the validity of these regulations is not now, and appears never to have been, before us, that issue is in any case readily distinguishable from the one that is.

We have specifically recognized the responsibility of the FCC to guard against racially discriminatory programming. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). The FCC has reached the conclusion that a broadcaster's programming will inevitably fail fairly to reflect the tastes and viewpoints of minorities if those minorities are systematically excluded from the broadcaster's employ.[42]

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[42] The FCC in its Memorandum Opinion and Order and Notice of Proposed Rulemaking on this matter stated in part that:

> A refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public. Thus, it immediately raises the question of whether he is consulting in good faith with Negro community leaders concerning programming to serve the area's needs and interests. Indeed, the very fact of discriminatory hir-

This is a far different question from the one involved in the appeal before us. The FPC is expressly charged with proscribing any discrimination, including, of course, racial discrimination, in the services that its regulatees render to the public. 15 U.S.C. §§ 717c(b) and d(a); 16 U.S.C. §§ 824d(b) and e(a) (1970).[46] But the likelihood that racial discrimination in employment might work its way into the provision of those services seems to us a slight one. More important perhaps, we would expect such service discrimination to be far more easily identified and remedied than is true of discrimination in programming, which might be so subtle and unsusceptible of direct remedy as to require the eradication of its root cause.

d. *Other Agenices and Employment Discrimination.*

Petitioners cite several other instances of agency action to curb employment discrimination by regulatees. The Securities and Exchange Commission in 1971 issued a release which called attention to existing requirements that registrants disclose on appropriate SEC forms the pendency of civil rights proceedings which could affect their business activities. In thus acting, however, the SEC appears to us merely to have been fulfilling its proper role of seeing that investors are fully informed of circumstances which might bear on the financial pros-

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ing policies may effectively cut the licensee off from success in such efforts.

33 F.R. 9960, 9962 (1968).

[46] It is to this specific statutory instruction to prohibit service discrimination by regulatees, rather than to the "public interest" standard, that the Commission points as support for its regulation of discrimination at recreational facilities at hyrdoelectric facilities. Br. 29; Order No. 341, 37 FPC 775 (1967).

pects of securities-issuing corporations. A corporation's involvement in civil rights litigation may constitute such a circumstance, as may its involvement in any other kind of litigation. Indeed, the SEC release in question was only partly directed at disclosure of pending civil rights proceedings; it also called attention to the existing requirement that registrants disclose the pendency of suits against them under federal environmental protection laws. *See* SEC Securities Act Release No. 5170 & Exchange Act Release No. 9252 (1971).

We note also that the SEC has expressly declined to promulgate rules concerning employment discrimination by regulatees, reasoning that "[a]lthough . . . the Commission may act to assure that regulated entities do not follow practices (including employment practices) that may prove inimical to the investing public or . . . other elements of the Commission's concern," it has not been adequately shown "what the impact of such practices might be on the investing public and our capital markets." 39 Fed. Reg. 2809, 2810 (1974). *See also* 37 Fed. Reg. 28,767 (1972).

The Interstate Commerce Commission and Civil Aeronautics Board have each given notice of proposed rulemaking on the subject of employment discrimination by regulatees, but neither agency has taken any further action. *See* 36 Fed. Reg. 10,741 (1971); 37 Fed. Reg. 15,518 (1972). Of the Federal Home Loan Bank Board's regulations governing the employment practices of regulated banks, 12 C.F.R. § 528.7 (1974), it suffices for the moment to say that their validity is not an issue in this appeal.

C. *FPC Regulation of Employment Discrimination Coincidentally to Proper Commission Concerns.*

The foregoing suggests our inability to find that Congress intended for the Commission to entertain and to

adjudicate individual complaints of employment discrimination by its regulatees, and to impose sanctions unrelated to the performance of its central regulatory purposes. At the same time we cannot state flatly that the Commission may never "regulate" employment discrimination, if by that it is meant that such discrimination can never figure in the Commission's regulatory calculations. We can foresee situations in which consideration by the Commission of a regulatee's discriminatory employment practices, including rules governing the invocation of that consideration, could be reasonably related to the pursuit of the Commission's proper objectives. We therefore conclude that the Commission does have jurisdiction over employment discrimination in the narrower sense described at the outset of the discussion.

The Commission's task in protecting the consumer against exploitation can be alternatively described as the task of seeing that no unnecessary or illegitimate costs are passed along to that consumer. Costs incurred by reason of a regulatee's choosing to practice racial discrimination are within the reach of that responsibility. Without attempting an exhaustive enumeration of such costs, we identify at least the following as indicative of those arguably within the Commission's range of concern: (1) duplicative labor costs incurred in the form of back pay recoveries by employees who have proven that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination,[47] (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because

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[47] *See* Exec. Order No. 11,246 3 C.F.R. 169 (1974) (all contracts with federal government to include private contractor's promise not to discriminate in employment; contracting government agencies to cancel for breach of such promise).

of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion.

Obviously such costs of employment discrimination range from the very definite and easily ascertainable to the very questionable and virtually unquantifiable. The problem of how to see that they are not borne by the consumer could arise in any number of different regulatory contexts, including both rate and certificate proceedings. We therefore do not attempt to detail all the various ways the Commission may thus "regulate" employment discrimination, leaving this in the first instance to the Commission itself.

A regulatee's performance in the area of equal employment opportunity may also be relevant to that company's efforts to secure a license renewal or other Commission authorization. It is conceivable that an applicant's record could be so riddled with discrimination-related legal difficulties, and its future so lacking in any promise of improvement on that score, that the Commission could validly conclude that for this reason it should not be permitted to be the recipient of franchise grants. In the long run, after all, the most efficient, lowest-cost production and distribution of electricity and natural gas will be that which is conducted in compliance with the laws, employment discrimination laws and other laws alike.

Moreover, the Commission is not necessarily confined to consideration of employment discrimination in successive adjudicatory proceedings. There are any number of matters on which it might be positively beneficial for the Commission to make rules rather than proceed on a

case-by-case basis. There is the potentially quite complex question of what costs associated with employment discrimination litigation will and will not be disallowed. It is at least conceivable that a regulatee with a very poor equal employment opportunity record might be presumed to have incurred excess labor costs because of its exclusionary practices, and that these costs, being difficult to quantify and prove, will be rebuttably presumed to equal a certain percentage of actual labor costs.

The line is always to be drawn between regulation reasonably related to the Commission's central functions, and regulation of employment discrimination for its own sake. The line may well be difficult to draw on occasion, but it is the business of agencies—and of courts—to do so.

D. *The Commission's Constitutional Obligations.*

Petitioners' claim founded on the Constitution is that it not only empowers but also requires the Commission to proscribe employment discrimination by regulatees. This is because the actions of the regulated companies are assertedly "state action" and therefore subject to the Fifth Amendment's prohibition of racial discrimination. Three circumstances are relied on as establishing the necessary intertwining of government with private entity which results in the latter's conduct being considered "state action." These are (1) the otherwise comprehensive extent of federal regulation of the FPC regulatees; (2) the enjoyment by the companies of what amounts to a government-granted monopoly; and (3) their performance of a governmental function in the production and transmission of energy. The Commission meets the "state action" claim by denying that the government is "significantly involved" with the regulated companies.[48]

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[48] We note that the Supreme Court recently held in Jackson v. Metropolitan Edison Co., —— U.S. —— (Dec. 23, 1974),

In our view, however, the question that is most immediately relevant to the powers and duties of the Commission to regulate employment discrimination is not the familiar one of "state action" *vel non*, but the distinct, if seldom isolated, issue of what the consequences may be of a finding of "state action."

The most familiar, and perhaps also the most natural, consequence of the erasure of the distinction between government and private entity is that the constitutional obligations of the government—not to discriminate on racial grounds, not to infringe freedom of speech, etc.—devolve as well upon the ostensibly private entity and are enforceable against it.[49] It is possible, however, that the existence of the "state action" relationship also imposes some new obligation on the government. If the per-

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that the termination of service by a state-regulated electric utility did not constitute "state action" subject to the Fourteenth Amendment's due process clause. For the reason stated in text, however, we do not undertake the sifting of particular facts and circumstances necessary to say whether the same is true of the employment practices of the various kinds of Commission regulatees, among them some that are actually situated "upon . . . the public lands and reservations of the United States." 16 U.S.C. § 797(e) (1970). *Cf.* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[49] *See, e.g.*, Evans v. Newton, 382 U.S. 296, 302 (1966) ("public character" of recreation facility required that it be "treated as a public institution subject to the command of the Fourteenth Amendment"); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (lessee of state property must comply with proscriptions of Fourteenth Amendment); Terry v. Adams, 345 U.S. 461 (1953) (exclusion of Negroes by county political organization held unconstitutional); Smith v. Allwright, 321 U.S. 649 (1944) (exclusion of Negroes by state political party held unconstitutional); Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963) (federally funded hospital may not discriminate on racial grounds).

sistence of such a relationship between the government and one practicing racial discrimination constitutes an ongoing constitutional violation, for example, perhaps the government incurs an obligation to terminate the relationship.[50] This like other obligations of the government would be enforceable in a court of law, and, if it had not already been so enforced, would presumably be a ground for objecting in proceedings before the Commission to license renewals and the like.

But the petitioners urge on us a third possible consequence of the "state action" relationship, namely, that while that relationship lasts the government must affirmatively regulate its private partner to insure that the latter discharges the constitutional obligations devolving upon it because of the relationship. Precedent for an agency's being constitutionally required to detail the constitutional obligations of its regulatees is very limited, however. In *Business Executives Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), a division of this court, with one judge dissenting, held that the Constitution prohibited regulated broadcasters from rejecting all controversial advertising, and the FCC was commanded to develop "reasonable regulatory guidelines"

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[50] *See, e.g.*, McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972) (Treasury Secretary enjoined from extending tax benefits to private clubs and fraternal orders that excluded Negroes); Green v. Connally, 330 F. Supp. 1150, 1164-65 (D.D.C. 1971), *aff'd sub nom.* Green v. Colt, 404 U.S. 997 (1971) (federal government permanently enjoined from extending tax benefits to racially segregated private schools); Green v. Kennedy, 309 F.Supp. 1127 (D.D.C. 1970) (preliminary injunction in same case); Irvis v. Scott, 318 F. Supp. 1246 (M.D. Pa. 1970) (state liquor license of fraternal order that excluded Negroes held invalid), *rev'd sub nom.* Moose Lodge No. 407 v. Irvis, 407 U.S. 163 (1972); Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967) (state enjoined from entering construction contracts with private parties practicing employment discrimination).

to carry out this constitutional command. *Id.* at 665.[51] That decision was, however, reversed by the Supreme Court *sub nom. Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). The notion of constitutionally requiring the FCC to regulate in a certain way was the specific subject of considerable criticism by the Court, *id.* at 125-27, though it no doubt was concerned with the problem that regulation of broadcasters under the authority of the First Amendment would itself raise First Amendment problems.

Moreover, a requirement of affirmance regulation would raise many problems. Which of the various constitutional commands addressed in the first instance to the government must the government reinterpret for its private collaborators, and what degree of specificity is required? If, as we have found to be true in the case before us, an agency lacks the statutory power to "regulate" in this way, does the Constitution itself piggy-back such power onto the statutory powers whose exercise gave rise to the state-action relationship? No such problem exists where the private entity is directly subject to the legislature without the intercession of an agency, but the proposition then becomes a truly anomalous one, namely, that the Constitution compels the legislature affirmatively to legislate in a certain way.

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[51] *See also* Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961) ("By its inaction, . . . the state has . . . made itself a party to the refusal of service. . . .) (dictum); Public Utilities Commission v. Pollak, 343 U.S. 561 (1952) (where challenge made to government's allowance of allegedly unconstitutional conduct of regulatees, the Court found it "appropriate to examine into what restriction . . . the First and Fifth Amendment place upon the Federal Government") (dictum).

III

In the light of what has been said above, the position taken by each side appears to be partially right and partially wrong. Insofar as petitioners maintain that the Commission is not completely without jurisdiction to consider, and indeed to write regulations concerning, employment discrimination by its regulatees, they appear to be correct. It is also clear, however, that they have proposed a rule which, at least in certain of its provisions, is well beyond the Commission's power to adopt. Section 9, for example, imposing on the Commission the duty to entertain and to act upon individual discrimination complaints, seems to us not reasonably related to the furtherance of the Commission's proper objectives. The hearing and adjudication of individual complaints would be an inordinately time-consuming process in view of the very slight impact it might have on the efficient operation of the regulated industries. On the other hand, those sections providing for the annual filing with the Commission of a form already due the EEOC (section 6), and for intervention and receipt of evidence in Commission proceedings (sections 10 and 11), might well be viewed as orderly methods of bringing to the Commission's attention information which could be relevant to its deliberations in the ways described in Part II of this opinion.

We do not attempt a section-by-section appraisal of the rules at this time. That would be inappropriate on this record, and in the absence of prior Commission consideration in rule making by reference to the statutory boundaries to its authority demarcated hereinabove.

Turning briefly to constitutional considerations, we doubt for reasons already stated that the Commission is required to enforce the constitutional obligations of its regulatees by affirmative regulations. The Commission

does not appear to have refused *all* affirmative regulation, however. In this context the confusion over this point in the record, along with our practice of not deciding constitutional questions unnecessarily, persuades us not to pursue the matter any further, except to say that, however we might resolve our difficulties with the proposition that the Commission is constitutionally required to adopt *some* anti-discrimination rule, we are very sure that it is not required to adopt *this* one. Constitutional obligations are occasionally translated by the courts into terms as detailed, specific, and far removed from the constitutional language as are the terms of this rule. *See, e.g., Miranda v. Arizona*, 384 U.S. 426 (1966); *United States v. Frazier*, 317 F. Supp. 1079 (M.D. Ala. 1970). This is done only occasionally, however, and after some experience has shown the need of such strict prophylaxis. In any case, it is not the courts but the Federal Power Commission which must particularize any constitutional obligation that may exist, and this task should certainly be left in the first instance to the Commission.[52]

If the petitioners have been extravagant in their claims, however, the Commission has been miserly in its response. The request for the adoption of the proposed rule may have been excessive, but it is not at all clear that the Commission was free to consider that this was the only request made. It was not in any event free to deny even that request for the reason (if it was its reason) that it had no authority whatsoever to promulgate any rules relating to employment discrimination.

The result for the purposes of the disposition of this review proceeding is that the important jurisdictional

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[52] Even in *Business Executives Move for Vietnam Peace, supra* note 67, this court chose to "leave the Commission and licensee broad latitude to develop 'reasonable regulations.'" 450 F.2d at 663.

questions inherent in it have not been framed in a meaningful way. The parties themselves have blunted and obscured their extreme positions to the point of retreat, although one that cannot in either case be exactly measured. Not wishing to be understood either to imply by a reversal that the petitioners' proposed rule could be adopted as is, or to endorse by an affirmance the Commission's broad disavowal of any jurisdiction over racial discrimination by its regulatees, we have concluded that the wisest course is to vacate the Commission's order and remand for further proceedings consistent with this opinion.[53]

It is so ordered.

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[53] We have concerned ourselves herein only with the Commission's jurisdiction—with its power to adopt rules relating to employment discrimination. Nothing has been said of the Commission's considerable discretion, in common with other agencies, not to promulgate rules even when it has the authority to do so. The Commission might well determine that rule making in the area of employment discrimination, though permissible, should be deferred at least temporarily in favor of the information and experience to be gained from case-by-case consideration of such matters as they arise in normal rate making and licensing proceedings. Since the Commission did not purport to exercise such discretion in this case, the question of whether it could validly do so is not before us.

Before the

FEDERAL POWER COMMISSION

Docket No. R-447

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

PROPOSED RULE

Section 1. *Definitions.* As used in this rule: (1) "Commission" means the Federal Power Commission; (2) "licensee" means any person, State or municipality licensed under the provisions of section 4 of the Federal Power Act, and any assignee or successor in interest thereof; (3) "natural gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale; (4) "person" includes an individual or a corporation; (5) "public utility" means any person who owns or operates facilities subject to the jurisdiction of the Commission under Parts II or III of the Federal Power Act, and (6) "regulatee" means any licensee, natural gas company or public utility.

Sec. 2. *Policy.* The Commission finds and declares that: (1) Equal employment opportunity for all persons regardless of race, color, religion, sex or national origin is a national policy; (2) the furtherance of that national policy is a matter of the public interest, and (3) it shall, in each determination under the Federal Power Act or the Natural Gas Act with respect to the public interest, give material consideration to such national policy.

Sec. 3. *Unlawful Employment Practices.* No regulatee shall (1) fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; (2) limit, segregate or classify its employees in any way which would deprive or tend to deprive any individual of employment opportunities of otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin; (3) discriminate in admission to, or employment in, any program of apprenticeship, training or retraining, including on-the-job training, on account of an individual's race, color, religion, sex or national origin; (4) discriminate against any employee or applicant for employment because such employee or applicant has opposed any employment practice made unlawful by Federal, State or local law or regulation or because he has in good faith made a charge of such practice or testified, assisted or participated in any manner in an investigation, proceeding or hearing of such practice by any lawfully constituted authority, or (5) print or publish or cause to be printed or published any notice or advertisement relating to employment by such regulatee, indicating any preference, limitation, specification or discrimination based on race, color, religion, sex or national origin, except where a preference or specification is for the purpose of remedying past practices of discrimination.

Sec. 4. *Equal Employment Opportunity Programs. Duties of Management.* Each regulatee shall establish, maintain, carry out and file with the Commission a written equal employment opportunity program, in which the regulatee shall commit itself to each of the following courses of action: (1) Define the responsibility of each level of management to insure a positive application and

vigorous enforcement of the policy of equal employment opportunity, and establish a procedure to review and control managerial and supervisory performance; (2) inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and secure their cooperation; (3) communicate the equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis; (4) conduct a continuing campaign to exclude every form of prejudice or discrimination based on race, color, religion, sex or national origin from its personnel policies and practices and working conditions, and (5) conduct continuing reviews of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure genuine equality of opportunity to participate fully in all organizational units, occupations and levels of responsibility.

Sec. 5. *Equal Employment Opportunity Programs. Substantive Content.* Each regulatee shall include in its equal employment opportunity program such specific practices as the following:

(1) To assure nondiscrimination in recruiting: (a) Posting notices in the regulatee's employment offices informing applicants of their equal employment rights and their right to notify the Federal Power Commission or other appropriate agency if they believe they have been the victim of discrimination; (b) Planning a notice in bold type on the employment application informing prospective employees that discrimination on account of race, color, religion, sex, or national origin is prohibited and they may notify the Federal Power Commission or other appropriate agency if they believe they have been discriminated against; (c) placing employment advertise-

ments in media which have significant circulation among minority groups and females in the recruiting area; (d) recruiting through schools and colleges with significant minority group and female enrollments; (e) maintaining systematic contacts with minority, human relations and female organizations, leaders and spokesmen to encourage referral of qualified minority and female applicants; (f) encouraging present employees to refer minority and female applicants, and (g) making known to all recruitment sources that qualified minority and female persons are being sought whenever the company hires.

(2) To assure nondiscrimination in selection and hiring: (a) Instructing those of the regulatee's staff who make hiring decisions that all applicants for all jobs are to be considered without discrimination; (b) cooperating with unions in the development of programs to assure qualified minority and female personnel equal opportunity for employment and including an effective nondiscrimination clause in new or renegotiated union agreements, and (c) avoiding the use of selection techniques or tests which have the effect of discrimination against minority groups or females.

(3) To assure nondiscrimination in placement and promotion: (a) Instructing those of the regulatee's staff who make decisions on placement and promotions that minority and female employees are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed to determine whether this results from discrimination; (b) giving all employees equal opportunity for positions which lead to higher positions, and inquiring as to the interests and skills of all lower paid employees with respect to any of the higher paid positions, followed by assistance, counseling, and effective measures to enable employees with interest and potential to qualify themselves for such positions, and (c) reviewing senior-

ity practices and seniority clauses in union contracts to insure that such practices or clauses are not discriminatory and do not have a discriminatory effect.

(4) To assure nondiscrimination in other areas of employment practices: (a) Examining rate of pay and fringe benefits for present employees with equivalent duties, and adjusting any inequities found, and (b) advising all qualified employees whenever there is an opportunity to perform overtime work.

Sec. 6. *Annual Employment Reports.* Each regulatee shall, contemporaneously with the filing of its EEO-1 form with the United States Equal Employment Opportunity Commission, file a copy thereof with the Commission.

Sec. 7. *Applicants to furnish equal employment information.* Each applicant for a license, renewal thereof, certificate of public convenience and necessity, rate change, permission to abandon a facility, permission to sell, lease or dispose of a facility, permission to merge facilities or any other permission or authorization in which the Commission is charged by law with protecting the public interest, shall include with its application (1) a report indicating the manner in which the specific practices undertaken pursuant to the regulatee's equal employment opportunity program have been applied and the effect of these practices upon the applications for employment, hiring and promotions of minority group members and females; (2) a report indicating whether any complaint has been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the applicant, including the persons involved, the date of filing, the court or agency before which the matter is or has been, the file number (if any), and the disposition or current status of the matter, and (3) a copy of the regulatee's last current EEO-1 form.

Sec. 8. *Affirmative Action Plans satisfactory.* In the case of any regulatee which is required to file an affirmative action plan with the Office of Federal Contract Compliance of the United States Department of Labor or any other Federal agency, a copy of such plan may be filed in lieu of the program required under the provisions of sections 4 and 5 of this rule.

Sec. 9. *Complaints of discrimination.* Any person who believe himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, by himself or by a representative, file a complaint with the Commission. The provisions of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations with respect to the processing of complaints, the conduct of hearings and the issuance of decisions and orders shall apply to complaints filed under this section.

Sec. 10. *Intervention.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, in accordance with the provisions of section 1.8 of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations, participate in any proceeding involving applications for such authorizations or permissions as the Commission may give under statutory or other delegated authority administered by it.

Sec. 11. *Consideration of equal employment information in making public interest determinations and sanctions.* In each proceeding in which the Commission is charged by law with protecting the public interest, including but not limited to applications for licenses, certificates of public convenience or necessity, rate changes, permission to abandon facilities, permissions to sell, lease or dispose of facilities and permissions to merge facilities, the Commission shall give material consideration to

the information required to be provided under the provisions of sections 4, 5, 6 and 7 of this rule, and may deny, delay or condition any such license, certificate, rate change, or permission in accordance with such consideration.

Sec. 12. *Referrals and Deferrals to EEOC.* The Commission may refer any complaint involving a probable violation of any provision of Title VII of the Civil Rights Act of 1964, as amended, to the Equal Employment Opportunity Commission. If duplicate complaints are filed both with the Commission and with the Equal Opportunity Commission, the Commission shall defer jurisdiction and the Equal Employment Opportunity Commission will process the complaint.

Sec. 13. *Proceedings in forma pauperis.* The Commission shall, upon the filing of an affidavit of indigency by any complainant or intervener, provided reasonable counsel fees and copies of transcripts of hearings without charge.

Sec. 14. *Penalties.* The penalties prescribed for violations of the regulations or orders of the Commission under the provisions of section 21 of the Natural Gas Act and section 316 of the Federal Power Act shall apply to violations of this rule or of orders of the Commission issued pursuant thereto.

Sec. 15. *Court Review of Orders.* Any party aggrieved by an order of the Commission issued pursuant to this rule may apply for rehearing and court review of such order in accordance with the provisions of section 19 of the Natural Gas Act of section 313 of the Federal Power Act.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

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September Term, 1974

No. 72–1959

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

Before: Bazelon, Chief Judge, McGowan and MacKinnon, Circuit Judges.

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Federal Power Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the Commission's order on review herein is hereby vacated and the case is remanded for further proceedings, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

HUGH E. KLINE, *Clerk.*

Date: February 5, 1975.

Opinion for the Court filed by Circuit Judge McGowan.

APPENDIX C

United States of America Federal Power Commission

EMPLOYMENT PRACTICES

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

DOCKET NO. R–447

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

THE NATIONAL URBAN LEAGUE

THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

THE NATIONAL ORGANIZATION FOR WOMEN

THE WOMEN'S EQUITY ACTION LEAGUE

THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS (IN CALIFORNIA)

THE ASSOCIATION FOR THE BETTERMENT OF BLACK EDISON EMPLOYEES

THE OFFICE OF COMMUNICATIONS OF THE UNITED CHURCH OF CHRIST

THE CENTER FOR COMMUNITY CHANGE

THE AMERICAN G.I. FORUM (IN CALIFORNIA)

THE MEXICAN AMERICAN POLITICAL ASSOCIATION

UNITED NATIVE AMERICANS, INC.

OPINION NO. 623

DECLARATORY OPINION AND ORDER ON PETITION FOR ISSUANCE OF A RULE RELATIVE TO EMPLOYMENT PRACTICES

(Issued July 11, 1972)

The petition to which this Opinion is addressed was filed June 22, 1972, and is treated herein as a petition

for a declaratory order. See 1.7(c) Federal Power Commission Rules of Practice and Procedure, 18 CFR 1.7(c).

Petitioners raise important issues of policy and law which should be considered through judicial interpretation of regulatory statutes and laws and regulations governing employment practices and equal opportunities. This subject matter has been considered previously by the Commission as it affects statutory provisions which the Federal Power Commission administers. Those Commission determinations have not been challenged on appeal, even though one or more petitioners herein were parties.

Three docketed cases [1] have arisen under the Federal Power Act, 16 U.S.C. 791(a) *et seq.*, in which a number of the underlying legal issues raised in the subject petition were considered. They were resolved by the Commission in a manner consistent with the views set forth in this Opinion and Order. They were presented in arguments raised by certain of the petitioners now before the Commission.

The Commission lacks the legal authority to promulgate equal employment opportunity regulations covering employment practices of those systems which it regulates as natural gas companies, public utilities or licensees, because it lacks the requisite delegation of Congressional authority to act in that area. Executive authority and constitutional considerations do not provide the basis for Commission jurisdiction.

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[1] *Pacific Gas and Electric Company*, 44 FPC 1365, 1373 (1970), appeals dropped, unreported orders of the Court of Appeals for the Ninth Circuit filed April 26, 1971, and June 22, 1971, *Pacific Gas and Electric Company* v. *Federal Power Commission*, Nos. 71-1027, 71-1028, 71-1453 and 71-1454; and *Virginia Electric and Power Company*, FPC , order issued August 5, 1971, not appealed.

Simply stated, the Commission is not the designated agency for the administration of equal employment laws or any other type of labor regulation. As pointed out *infra,* regulation of this type is the province of a specific number of departments and agencies of the Federal Government, and state agencies.

Where the Commission does have specific responsibilities in the area of equal rights, they are being enforced. These are: (1) as an employer and agency of the Federal Government subject to the requirements of Executive Order No. 11478, August 8, 1969, 34 F.R. 12985; and (2) as the Congressionally delegated agency charged by the Congress with the duty to administer the comprehensive use of resources standard governing hydroelectric licensing under the Federal Power Act, 16 U.S.C. 803(a), i.e., in a manner to insure that multi-purpose hydroelectric facilities (e.g., power production, navigation, recreation and other uses), are open to use by all persons upon nondiscriminatory bases. Implementing regulations of the Commission are set forth in Federal Power Commission Administrative Order No. 131, Equal Employment Opportunity, issued January 26, 1970, *Administrative Manual;* and Federal Power Commission Order No. 341 Amending Regulations Under the Federal Power Act, Prohibition of Discrimination at Recreational Facilities at Licensed Hydroelectric Projects, issued April 19, 1967, 37 FPC 775.[2]

The Commission is mindful and fully supportive of the National policies of this Nation directed at the elimination of discriminatory treatment of persons based upon race, creed, color, religion, sex or national origin. The Commission welcomes judicial review and

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[2] Codified Part 8 Commission Regulations under the Federal Power Act, 18 CFR Part 8.

final resolution of the findings and conclusions set forth in this Opinion.

Requested Relief.—Petitioners seek a general rulemaking action of the Commission directed to the promulgation of "* * * regulations prohibiting discrimination on account of race, color, religion, sex and national origin and assuring equal opportunity in the employment practices of its regulatees * * *." Petition, p. 3. Procedurally, petitioners seek public hearings before the Commission, oral argument and a general public rulemaking through notice of a rule[3] and written responses thereto. We deny that request because of the basic conclusions which the Commission has reached relative to the scope of its regulatory authority. As the Commission stated in *Pacific Gas and Electric, supra,* 44FPC 1368:

> The legal issues, which must be of concern to us in this proceeding, are those over which we have jurisdiction. We do not find the issues raised * * * sufficiently related to a legitimate regulatory purpose as expressed in the Federal Power Act that we can proceed as requested * * * we do not find it appropriate in the exercise of our general administrative power to order a hearing on ultimate issues which we could not lawfully resolve.

The bases of the Commission's jurisdiction to act in respect to natural gas companies, public utilities and licensees, are statutory: namely, the Federal Power Act, 16 U.S.C. 791(a) *et seq.,* passed in 1920 as the Federal Water Power Act, 41 Stat. 1063, and substantially amended in 1935, 49 Stat. 838; and the Natural Gas Act, 15 U.S.C. 717 *et seq.,* passed in 1938. Other statutes cited by petitioners in support of their

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[3] A proposed rule annexed to the petition is reproduced in Appendix A hereto.

claims do not grant jurisdictional authority to this Commission. In our judgment, the Congress has not granted authority under any of these statutes for this agency to act as a remedial forum for the redress of unlawful employment practices.

Discussion of Authorities—Petitioners legal arguments are directed to various sections of the Natural Gas Act, the Federal Power Act, the Civil Rights Act of 1964, as amended, 78 Stat. 241, 42 U.S.C. 1971 *et seq.*, the Civil Rights Act of 1866, 14 Stat. 27, the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d), Executive Order Nos. 11246 and 11375, the Fifth Amendment to the United States Constitution and the Fair Employment Practices Act of various states. We consider these *seriatim*.

Referring to the Natural Gas Act and natural gas companies, petitioners cite sections dealing with the Congressional grant of jurisdiction to the Commission to regulate interstate transportation and sale of natural gas for resale in interstate commerce in the public interest, 15 U.S.C. 717(a); the certification of such transactions and facilities therefor of natural gas companies and abandonment thereof as required by the public convenience and necessity, 15 U.S.C. 717f(b)(c); the control of the types of wholesale gas services of natural gas companies and rates therefor as required under a standard of just, reasonable, without undue discrimination or preference, 15 U.S.C. 717c(b), d; and general administrative procedural authority of the Commission, 15 U.S.C. 717o.

Referring to the Federal Power Act and public utilities and licensees, petitioners cite sections dealing with the Congressional grant of jurisdiction to regulate interstate transmission and sale of electric energy for resale in interstate commerce in the public interest, 16 U.S.C. 824(a); the control of the merger, sale

or disposition of jurisdictional properties of public utilities or acquisition of the capital securities thereof as required in the public interest, 16 U.S.C. 824b(a)(b); the control of the types of wholesale or bulk power services of public utiliites and rates therefor as required under a standard of just, reasonable, without undue discrimination or preference, 16 U.S.C. 824d(b), e; the licensing of hydroelectric project works of licensees upon streams over which the Congress has jurisdiction, upon public lands and reservations of the United States and at federally owned dams, 16 U.S.C. 797(e); and the general administrative procedural authority of the Commission, 16 U.S.C. 825h.

Essentially, petitioners argue that public interest considerations enfold the national policies against discrimination in employment and therefore make their implementation and execution a part of this Commission's regulatory jurisdiction and authority. We can not accept this generalized argument. Application of public interest concept in the context of any given regulatory statute presupposes inquiry into, and observance of, the legislative purposes of that Act. As pointed out *infra*, the Purposes of the National Gas and Federal Power Acts are economic regulation of entrepreneurs engaged in resource developments. So considered, we do not find the necessary nexus between those aspects of our economic regulatory activities and the employment procedures of the utility systems which we regulate, as would justify the ultimate conclusion petitioners draw. We distinguish employment procedures from other subjects such as national defense considerations, antitrust, environmental requirements, navigation, flood control or recreation, all of which are reflected in the Natural Gas and Federal Power Acts. See for example, 15 U.S.C. 717j,

717s(a); and 16 U.S.C. 803(a)(h), 804, 805, 809, 824a (a) and 825j.

Nothing in either of the basic statutes which we administer—the Federal Power Act and the Natural Gas Act—and particularly the sections referenced by petitioners, addresses the matter of employment procedures of natural gas companies, public utilities or licensees, nor does the legislative history of either Act give any basis for believing that Congress intended to confer jurisdiction upon the Commission to regulate those activities. Both statutes are economic regulatory devices born out of economic development and financial conditions which prevailed nationally earlier in this century. The Federal Water Power Act (Part I of the Federal Power Act), is, as its preamble states, "* * * An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of public lands in relation thereto * * * and for other purposes.", 41 Stat. 1063. The Federal Power Act is Title II of the Public Utility Act of 1935, 49 Stat. 838, "An Act To provide for control and regulation of public utility holding companies, and for other purposes.", 49 Stat. 803. The Natural Gas Act, as its preamble states, is "An Act To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.", 52 Stat. 821.

Constitutional considerations and the inability of individual states to regulate and control multi-state utility operations, i.e., interstate transmissions and wholesale transactions involving electric energy and natural gas were principal factors in the enactment of the Federal Power and Natural Gas Acts. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *Federal Power Commission, et al.* v. *Natural Gas Pipeline Co., et al.*, 315 U.S. 575,

581–83 (1942); *Connecticut Light & Power Co.* v. *Federal Power Commission,* 324 U.S. 515, 525–531 (1945); and *Federal Power Commission* v. *Southern California Edison Company, et al.,* 376 U.S. 205, 213–14 (1964). In short, Congress, through the enactment of these statutes, provided Federal regulation of electric and natural gas services and transactions which are beyond the reach of state public service commission control. See for example, House Report No. 61, on H.R. 3184 (which became the Federal Water Power Act), 66th Cong., 1st Sess., p. 5; Senate Report No. 621, on S. 2796 (which became the Federal Power Act), 74th Cong., 1st Sess., pp. 3, 17–18, 22; and House Report No. 709 on H.R. 6586 (which became the Natural Gas Act), 75th Cong., 1st Sess., pp. 1–3.

The consumer and services and prices for electric and gas utility services were focal points of Congressional concern in the enactment of both statutes. See *Pennsylvania Water & Power Co. et al.* v. *Federal Power Commission et al.,* 343 U.S. 414, 418 (1952) "A major purpose of the whole Act is to protect power consumers against excessive prices * * *."; *Atlantic Refining Co., et al.* v. *Public Service Company of New York, et al.,* 360 U.S. 378, 388 (1959), "the [Natural Gas] Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."; and *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp., et al.,* 365 U.S. 1, 19 (1961) "When Congress enacted the Natural Gas Act, it was motivated by a desire 'to protect consumers against exploitation at the hands of natural gas companies'."

It is in the context of these considerations that we reject petitioners' broad public interest arguments. The public interest concept does not provide the basis for this Commission to regulate employment proce-

dures of natural gas companies, public utilities or licensees, any more than the public interest would have us regulate the securities, the taxes, the patents, the safety, the wages and hours, the advertising or any other of a number of areas which Congress has created specialized agencies to regulate, including equal employment opportunities. The Natural Gas and Federal Power Acts do not admit of such interpretation.

Congress has acted in the area of labor law and equal employment opportunity protection. See, for example, 29 U.S.C. Chapters 1–15, and in particular, Chapter 2. Women's Bureau, Chapter 4B. Federal Employment Service, Chapter 5. Labor Disputes, Mediation and Injunctive Relief, Chapter 6. Jurisdiction of Courts in Matters Affecting Employer and Employee, Chapter 7. Labor-Management Relations, Chapter 8. Fair Labor Standards, Chapter 9. Portal to Portal Pay, Chapter 11. Labor-Management Reporting and Disclosure Procedure, Chapter 12. Department of Labor, Chapter 14. Age Discrimination in Employment, and Chapter 15, Occupational Safety and Health; the Civil Rights Act of 1964, 78 Stat. 241; the Equal Pay Act of 1963, 77 Stat. 56; and the Equal Employment Opportunity Act of 1972, 86 Stat. 103.[4] In no instance did the Congress specify ad-

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[4] *Cf.* the Civil Rights Acts of 1866, 14 Stat. 27, and 1870, 16 Stat. 140, 42 U.S.C. 1981–1982, Equal rights under the law, Property rights of citizens.

§ 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens, and shall be subject to like punishment, pains, penal-

ministrative duties for this Commission in these areas.

The basic statute of concern in light of petitioners' arguments, is the Civil Rights Acts of 1964, as amended, including the Equal Employment Opportunity Act of 1972. As pointed out in the Opinion of the Supreme Court, *Griggs, et al.* v. *Duke Power Company,* 401 U.S. 424, 429–31 (1971), "The objective of Congress in the enactment of Title VII [Civil Rights Act of 1964] * * * was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees * * * what is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate insidiously to discriminate on the basis of racial or other impermissible classification." Title VII of that Act, 78 Stat. 253, 42 U.S.C. 2000e, establishes the Equal Employment Opportunity Commission to administer those provisions. That Act specifies the actions which constitute unlawful employment practices, 42 U.S.C. 2000e–2, –3.[5] Investigatory authority is conferred

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ties, taxes, licenses, and exactions of every kind, and to no other.

§ 1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

[5] Among the proscribed conduct are "* * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual wth respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * * or * * * to limit, segregate, or classify * * * to deprive any individual of employment opportunities or otherwise adversely affect * * * status as an employee, because of such individual's race, color, religion, sex, or national origin", 42 U.S.C. 2000e–2(a)(1)(2).

upon the EEOC, including examination of witnesses and production of evidence with provision for judicial enforcement of investigatory determinations, 42 U.S.C. 2000e–5, –8, –9. The EEOC may prescribe procedural regulations pursuant to the requirement of the Administrative Procedure Act, 42 U.S.C. 2000e–12. It may direct the keeping of records relevant to employment practices and enforcement of the Civil Rights Act, subject to the statutory provision that information so obtained by the EEOC shall not be made public by it prior to the initiation of any proceeding involving such information, 42 U.S.C. 2000e–8. Its investigation of claimed violations of Title VII, by statute, are not public without the written consent of the parties and may not be used as evidence in any subsequent proceeding, 42 U.S.C. 2000e–5(a). The Act provides for mediation and conciliation measures leading to voluntary compliance measures by the EEOC, 42 U.S.C. 2000e–5(a). Private persons aggrieved have recourse to the courts with injunctive and equitable remedies, together with court appointed counsel, 42 U.S.C. 2000e–5(e). The Act also provides for civil enforcement actions by the Attorney General, 42 U.S.C. 2000e–6, –5(e).

Pursuant to the 1972 amendments, the coverage of Title VII provisions are extended to certain state and local government authorities and private employers with 15 or more persons and private and public educational institutions, 86 Stat. 103, 42 U.S.C. 2000e.

The power of the EEOC is extended "* * * to prevent any person from engaging in any [equal opportunity] unlawful employment practices * * *", 86 Stat. 104, 42 U.S.C. 2000e–5. The EEOC is required to serve notice of charges, which, by statute, are not to be made public by the Commission; to investigate the same, according "* * * substantial weight to final

findings and orders made by state or local authorities in proceedings commenced under State or local law * * *"; and to endeavor to mediate or conciliate controversies which have reasonable cause, or otherwise to dismiss the charge. The EEOC is to defer, initially, to state or local agencies having jurisdiction in the premises under an exhaustion of remedies principle. Where the EEOC is unable to mediate or conciliate, it may bring a civil action in the Federal courts in pursuit of equitable remedies or affirmative relief. Where the respondent party is a governmental authority, the Act provides for initiation of such court actions by the Attorney General. The EEOC and the Attorney General are also authorized to seek temporary judicial relief. The party aggrieved may also initiate court action under certain conditions, may seek court appointed counsel and may intervene in actions initiated by the EEOC or the Attorney General. The Equal Employment Opportunity Act of 1972 provides for transfer of these functions of the Attorney General to the EEOC effective in 1974.

The 1972 amendments confer upon the EEOC, in connection with its hearings and investigations, the powers of National Labor Relations Act, 29 U.S.C. 161, 86 Stat. 109, 42 U.S.C. 2000e–9. The type of investigatory rulemaking which petitioners seek before this Commission is within the authority of the EEOC to effectuate. Indeed, that agency's established reporting requirements appear to comprehend essentially the type of information which petitioners seek to assemble through this agency. The amendments provide for a Presidentially appointed general counsel of the EEOC with the "* * * responsibility for the conduct of litigation as provided in Sections 706 and 707 [42 U.S.C. 2000e–5, –6] of this title.", 86 Stat. 110, 42 U.S.C. 2000e–4. In the enactment of the 1972 revisions to the

Civil Rights Act of 1964, the Congress considered and rejected a provision whereby recognized remedies for enforcement of equal rights and labor practices would be pre-empted. See, United States Code Congressional and Administrative News, 92nd Cong., 2nd Sess., No. 3, pp. 1049–50, 1022, 1043–44. Congress clearly evidenced its intention regarding the enforcement of equal rights, including its intention in respect to administrative actions dealing with equal employment opportunities. The Civil Rights Act, as amended, does not specify that all departments and agencies are to undertake the administration or implementation thereof. When the Congress wishes to accomplish that result, it so states. See, National Environmental Policy Act of 1969, 42 U.S.C. 4321, 4332, 4333.

The 1972 amendments establish an Equal Employment Opportunity Coordinating Council with "* * * responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. * * *", 86 Stat. 111. The Council is comprised of the Attorney General, Secretary of Labor, and the Chairmen of the EEOC, the United States Civil Service Commission and the United States Civil Rights Commission.

The Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d), cited by petitioners, is a part of the Fair Labor Standards Act of 1938, enforced by the Wage and Hour and Public Contracts Divisions of the Labor Department, not the Federal Power Commission. That Act's provisions are directed to wage differentials

based upon sex. As such, the coverage of this Act is more restrictive than the Civil Rights Act's prohibition of discrimination based upon sex, the latter extending to areas other than wage discrimination. Criminal and civil actions may ensue in enforcement of the Fair Labor Standards Act.

Executive Order No. 11246, September 24, 1965, 30 F.R. 12319, as amended by Executive Order No. 11375, October 13, 1967, 32 F.R. 14303, implements the "* * * program of equal employment opportunity in Government employment, employment by Federal contractors and sub-contractors and employment under federally assisted construction contracts * * *", regardless of sex, race, creed, color, or national origin, 3 CFR 685. As recognized in these orders, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, enunciates the national policy of equal opportunity in private employment, and Title VI, 78 Stat. 252, is specifically directed to non-discrimination in federally financially assisted programs. The Secretary of Labor is the designated administering official of Parts II and III of Executive Order No. 11246, which relate to Government contractors, sub-contractors, and federally assisted programs. Executive Order No. 11247, September 24, 1965, 30 F.R. 12327, assigns coordinating function responsibilities to the Attorney General in respect to Title VI matters. The Secretary of Labor, by Order No. 15–68, August 8, 1968, 33 F.R. 12600, assigned the responsibility under Executive Order No. 11246, to the Office of Federal Contract Compliance.[6]

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[6] Order No. 15–68 states in part (33 F.R. 12600–1):

"Under the general direction of the Secretary * * * the Office of Federal Contract Compliance (EEO) is hereby delegated authority and assigned responsibility for: * * * Carry-

(Continued)

Order No. 1, issued October 24, 1969, by the Office of Federal Contract Compliance re-delegates certain of its responsibilities to 16 departments or agencies, each with designated compliance responsibility relative to equal employment opportunity.[7] Order No. 1 states in part:

> "2. Action.—a. The agencies listed herein below are designated as compliance agencies. Other agencies, not so listed, are hereby relieved of any compliance responsibilities under the Executive Order [11246].", Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 4380. The Office of Federal Contract Compliance and the Equal Employment Opportunity Commission, on May 20, 1970, 35 F.R. 8461, entered into a Memorandum of Understanding "* * * to reduce duplication of compliance activities and to facilitate information exchange * * *."

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ing out * * * Parts II, III, IV of Executive Order No. 11246 as amended by Executive Order No. 11375 * * * Developing and recommending to the Secretary rules and regulations necessary or appropriate to achieve the purposes of * * * 11246 * * * 11375 * * * Coordinating with the Equal Employment Opportunity Commission and the Department of Justice on matters relating to Title VII * * * and maintaining liaison with other agencies having civil rights and equal employment opportunity activities * * *."

[7] The departments and agencies are: Agency For International Development, Department of Agriculture, United States Atomic Energy Commission, Department of Commerce, Department of Defense, General Services Administration (whose industries include electric, gas and sanitary services, holding and investment companies), Department of Health, Education and Welfare, Department of Housing and Urban Development, Department of the Interior (whose industries include mining and oil, petroleum, refining and related industries and pipeline transportation), National Aeronautical and Space Administration, Post Office Department, Department of Transportation, Tennessee Valley Authority, Department of the Treasury, Veterans Administration and the Environmental Protection Agency.

The Office of Federal Contract Compliance Implementing Rules and Regulations under Executive Order 11246, are set forth in Title 41, Code of Federal Regulations, Chapter 60, Part 60–1, Obligations of contractors and sub-contractors, Part 60–2, Affirmative action programs, Part 60–3, Employee testing and other selection procedures, Part 60–5, Washington plan, Part 60–6, San Francisco plan, Part 60–7, St. Louis plan, Part 60–8, Atlanta plan, and Part 60–20, Sex discrimination guidelines.[8] The Implementing Rules and Regulations of the Equal Employment Opportunity Commission are set forth in Title 29, Code of Federal Regulations, Chapter XIV, Part 1600 Employee responsibilities and conduct, Part 1601, Procedural regulations, Part 1602, Records and Reports, Part 1604, Guidelines on Discrimination because of sex, Part 1605, Guidelines on Discrimination because of religion, Part 1606, Guidelines on Discrimination because of national origin, Part 1607, Guidelines on Employee selection procedures, and Part 1610, Availability of Records.[9]

The foregoing matters we believe, effectively demonstrate why this Commission does not have the responsibilities pursuant to Executive Order Nos. 11246 and 11375, as alleged by petitioners.

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[8] Office of Federal Contract Compliance Order No. 14, issued January 14, 1972, sets forth proposed new procedures to standardize compliance reviews of employment in Federal contract areas. Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 4345.

[9] See also, Regulations of the Department of the Interior and of the General Services Administration, pursuant to their assigned responsibilities under Title VI of the Civil Rights Act of 1964 (Interior), 43 CFR Parts 17 and 17a, and (GSA), 41 CFR Subpart 101–6.2. Accommodations between Federal Labor and Civil Rights Laws are discussed in Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 5063.

Petitioners also cite the Fifth Amendment to the Constitution in support of their claims. We find nothing in the Constitution or the judicial interpretations thereof, as would support Commission regulation of utility employment practices. That which the Constitution does require, this Commission is now doing. No governmental action which this agency takes denies any person of equal protection of the laws. See *Moose Lodge No. 107* v. *Irvis, et al.*, —— U.S. ——, decided June 12, 1972, Slip Op. pp. 8–9, which discusses constitutional protections in the context of the Fourteenth Amendment:

> In 1883, this Court in *The Civil Rights Cases,* 109 U.S. 3, set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, "however discriminatory or wrongful," against which that clause "erects no shield," *Shelley* v. *Kraemer,* 334 U.S. 1, 13 (1948). That dichotomy has been subsequently reaffirmed in *Shelley* v. *Kraemer, supra,* and in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1951).
>
> While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "State action," on the other hand, frequently admits of no easy answer. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority, supra,* at 772.
>
> Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination. *Shelley* v. *Kraemer, supra.*

This Commission, as pointed out in *Pacific Gas and Electric, supra,* 44 FPC 1367–8, does not countenance discriminatory treatment in respect to the rendition of utility services which it regulates, based upon race, sex, color, creed or national origin; does not permit its hydroelectric licensees owning or operating multiple purpose reservoirs to discriminate in the use thereof, based upon race, sex, color, creed or national origin; and has affirmatively spoken out in respect to the need for all utility suppliers to fully implement the Nation's policy respecting elimination of discrimination in employment. Thus, where this agency takes "State action" within the meaning of Constitutional considerations, its processes do not deny equal protection of the laws either by reason of any Commission rule, regulation or order or by reason of enforcement of a private discriminatory action.

Petitioners' references to actions of the Federal Communications Commission and the Public Service Commission of the District of Columbia, are not persuasive in the interpretation of the provisions of Federal Power and Natural Gas Acts. Both are legally distinguishable. The Federal Communications Commission, the one Federal administrative utility regulatory body which has promulgated regulations in the area of equal employment practices of its regulatees of the general type petitioners seek, did so following judicial interpretation of one of the basic statutes which it administers, the Communications Act of 1934, 47 U.S.C. 151 *et seq., Office of Communication of the United Church of Christ, et al.* v. *F.C.C., et al.,* 359 F. 2d 994, 1003, 1006 (CADC, 1966).[10] The Court recog-

[10] As petitioners note, the Interstate Commerce Commission initiated a rulemaking inquiry on May 6, 1971, to consider whether there is discrimination in carriers' employment practices, whether laws are being violated, whether that Commis-

(Continued)

nized two basic concepts of that Act with a nexus to employment practices, the "fairness doctrine" and the "public reaction to programming test",[11] neither

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sion has jurisdiction to deal with the matter, and what action the Commission should take if it has jurisdiction, Notice of Proposed Rulemaking, Ex-Parte No. 278, 36 F.R. 10741. The Securities and Exchange Commission, by Release Nos. 5170 and 9252, July 19, 1971, called attention to disclosure requirements in SEC forms as to civil rights legal actions affecting the security registrant's business activities, such as loss of government contracts or civil rights enforcement activities. The Federal Home Loan Bank Board Regulation referred to by petitioners, April 21, 1972, 37 F.R. 8436, is an exercise of responsibility which that agency has by reason of *inter alia*, Title VIII, Fair Housing, Public Law 90–284, 82 Stat. 73, 81.

[11] Both tie to program content of mass communication media and relate to the bases upon which the FCC assesses the public performance of media facility owners under its licensing procedures, that in contradistinction to direct governmental control of programming. See Memorandum Opinion and Order and Notice of Proposed Rulemaking of the Federal Communications Commission released July 5, 1968, the initial order of that Commission in a series of actions, 33 F.R. 9960, 9961–2, which states in part:

"9. * * * there is the consideration that broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, must obtain a Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license. When these two considerations are taken together—the national policy against discrimination and the nature of broadcasting—we simply do not see how the Commission could make the public interest finding as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the national policy. In this respect—a mass media service to the public which is based entirely on a Federal license under a public interest standard—the situation clearly parallels the Federal policy in contract awards.

* * * * *

"11. The same question is raised when a substantial charge is made that a licensee is deliberately discriminatory in his em-

of which are reflected in the Natural Gas or Federal Power Acts. The Communications Commission, by orders released March 29, 1972, 37 F.R. 6586, February 12, 1971, 36 F.R. 3119, August 11, 1970, 35 F.R. 12892, and June 3, 1970, 35 F.R. 8825, adopted reporting regulations requiring cable television operators, comunications common carriers and broadcast licensees or permittees to affirmatively show non-discrimination plans in employment practices and to complete annual reporting thereon. Through Notice of Proposed Rulemaking released June 28, 1971, that Commission initiated inquiry into proposed regulations relative to discrimination based upon sex as a part of that Commission's administrative law, 36 F.R. 12542. A rule was adopted and released on December 21, 1971, 36 F.R. 25012.

The action of the District of Columbia Public Service Commission in respect to equal opportunity employment practices of its regulatees, *Re Potomac Electric Power Company,* 83 PUR 3d 113, 147–8, 152–8 (1970), 84 PUR 3d 236, 246 (1970), rests upon specific authority in that Commission. This includes statutory provisions governing that agency, 43 DC Code 303, general federal law, Civil Rights Act of 1964, Executive Order No. 11246 and general police regulation, District of Columbia Commissioners Order

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ployment policies. A refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public. Thus, it immediately raises the question of whether he is consulting in good faith with Negro community leaders concerning programming to serve the area's needs and interests. Indeed, the very fact of discriminatory hiring policies may effectively cut the licensee off from success in such efforts."

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No. 65–768.[12] That Commission is currently considering this subject in relation to the Potomac Electric Power Company. See, PSC–DC, Formal Case No. 576, In the Matter of Investigation of Employment Practices of the Potomac Electric Power Company.

Recent cases before the California Public Utilities Commission have established that the PUC does not have jurisdiction over such employment practices of regulated entities, *NAACP et al.* v. *All Regulated Public Utilities et al.*, Cal. P.U.C. Decision No. 77781, dated October 6, 1970, petition for writ of review denied the state Supreme Court unreported order, April 29, 1971; and *Re Pacific Gas & Electric Company,* 87 PUR 3d 270, 312 (1971). In substance, the California Commission found minority hiring practices to be a matter not within the scope of the state utility laws, but, rather, under the State Fair Employment Practice Act.

Petitioners refer to various state fair employment practice laws. We do not find regulatory jurisdiction in this Commission based upon those provisions. Moreover, as noted, *supra,* even the Equal Employment Opportunity Commission must defer to state agencies having jurisdiction in this area under an exhaustion of remedies principle.

We wish to make clear that should the Congress assign to this agency responsibility of the type proposed by petitioners, we would undertake the enforce-

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[12] 43 DC Code 303 states: "The Commission shall have power * * * to require and compel every public utility to comply with * * * all other laws of the United States applicable, and any municipal ordinance or regulation relating to said public utility." DC Commissioners Order No. 65–768 (D.C. Police Regulations, Article 47, Section 4), is a general police regulation prohibiting employment discrimination based upon race, color, religion, national origin or sex.

ment thereof as a matter of highest priority. We indicated in *Pacific Gas and Electric Company, supra,* 44 FPC 1368, our full commitment to " * * * the national policy that discrimination in employment is to be eliminated by all elements of our society, public and private. * * * ".

Limitations of the Proposed Rule—As will be apparent from an examination of the rule as proposed by petitioners, the processing of any complaints thereunder before an agency such as this Commission, which must observe the requirements of the Administrative Procedure Act and general public disclosure procedures, 5 U.S.C. 551 *et seq.,* would inevitably do violence to the non-public disclosure principles of the Civil Rights Act, 86 Stat. 104, 42 U.S.C. 2000e–5(a), 78 Stat. 264, 42 U.S.C. 2000e–8(e). Complaints of discrimination under Section 9 of the proposed rule, or Section 10 intervenor actions, would be public information under this agency's procedures, 18 CFR 1.36(c). Charges of discrimination are not public under the Civil Rights Act, 86 Stat. 104. Similarly, a general public disclosure of annual employment reporting data (EEO–1), pursuant to Section 6 of the proposed rule, would appear to transcend the non-disclosure principle of the Civil Rights Act, 78 Stat. 264.

Additionally, the proposed rule transcends basic legal requirements of the Federal Power and Natural Gas Acts. The statutory bases upon which this Commission must judge particular applications are set forth in the two Acts. Section 11 of the proposed rule would have that judgment accomplished basically in accordance with standards of the Civil Rights Act and general public interest concepts. Also, the penalty and enforcement provisions of the Natural Gas and Federal Power Acts, 15 U.S.C. 717s, 717t, 16 U.S.C. 825m,

825n, 825o, relate to proscribed conduct under those Acts. Section 14 of the proposed rule is directed to other laws. Section 15 of the proposed rule presents a similar legal difficulty in respect to appellate review procedures. Natural Gas and Federal Power Acts, 15 U.S.C. 717r, 16 U.S.C. 825*l*. Section 13 of the proposed rule assumes authority in this Commission to provide counsel fees. This agency does not have such authority. See, *Power Authority of the State of New York,* Order Denying Motions and Appeals, —— FPC ——, issued October 29, 1971 (mimeo. ed., pp. 3–4).

Administratively, the rule, as proposed, would be duplicative of established procedures which now operate throughout the Nation in respect to equal employment opportunity. These procedures are as outlined, *supra.* The Department of Justice has instituted a number of enforcement actions under those procedures. See, for example, *United States* v. *Louisville Gas and Electric Company,* United States District Court for the Western District of Kentucky, Civil Action No. 7312–G, order June 30, 1972; *United States* v. *Piedmont Natural Gas Company,* United States District Court for the Western District of North Carolina, Civil Action No. 72–128, order June 15, 1972; *United States* v. *Virginia Electric and Power Company, et al.,* 327 F.Supp. 1034 (1971), 4 EPD Paragraph 7502 (1971); and, *United States* v. *Georgia Power Company,* 3 EPD Paragraphs 8143, 8318 (appeal pending USCA5, No. 71–344).

To adopt the proposed rule would (a) make the criminal penalties of the Natural Gas Act, 15 U.S.C. 717t, and the Federal Power Act, 16 U.S.C. 825o, apply to violations of whatever employment codes were adopted by the Commission, and there is no indication of Congressional intent for this result; (b) make the determination of a violation subject to ad-

ministrative hearings rather than through trial in court, and the 1972 Act makes clear that the Congress intended a judicial, not an administrative, forum, pp. 10–11, *supra;* (c) make the determination of a just and reasonable rate turn on employment practices rather than upon adequate and reliable service to consumers at the lowest reasonable rate. In our view, Congress has not indicated that consumers should pay higher rates to companies which have FPC approved employment plans and lower rates to companies which do not; (d) make the determination of whether new facilities to supply needed energy to all citizens can be licensed turn upon the question of whether the company proposing the facilities has an FPC approved employment plan. Conversely, facilities already supplying needed energy would presumably be shut down as a sanction for violation of an FPC approved employment plan. There is no indication that Congress intended such a result; and (e) make a further proliferation of agencies having concurrent jurisdiction at a time when Congress had made clear its intent to coordinate such activities. This agency could not "coordinate" with other agencies on cases which are controlled by the Administrative Procedure Act.

Thus, we conclude that the primary jurisdiction over labor and employment practices lies in other agencies, as petitioners recognize when their proposed rule calls for the FPC to defer to EEOC; we conclude that that jurisdiction is exclusive in those agencies. We further conclude that neither the Natural Gas Act and Federal Power Act delegate authority to FPC to regulate employment practices, and that we hold that since there is no jurisdiction to adopt such a rule, no purpose will be served by noticing such a rule for consideration for adoption in

advance of a declaratory judgment determining the jurisdiction of the Commission.

The Commission further finds:

It is necessary and appropriate for the purposes of the Natural Gas Act and the Federal Power Act, 15 U.S.C. 717o, 16 U.S.C. 825h to order as hereinafter provided.

The Commission orders:

The petition, as described above, is hereby dismissed for lack of jurisdiction.

By the Commission.

[SEAL] KENNETH F. PLUMB,
Secretary.

[Appendix A]

(Rule As Annexed to Petition Filed With the Federal Power Commission June 22, 1972)

Before the Federal Power Commission

DOCKET NO. ——

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

PROPOSED RULE

SECTION 1. *Definitions.* As used in this rule: (1) "Commission" means the Federal Power Commission; (2) "licensee" means any person, State or municipality licensed under the provisions of section 4 of the Federal Power Act, and any assignee or successor in interest thereof; (3) "natural gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale of interstate commerce of such gas for resale; (4) "person" includes an individual or a corporation; (5) "public utility" means any person who owns or operates facilities subject to the jurisdiction of the Commission under Parts II or III of the Federal Power Act, and (6) "regulatee" means any licensee, natural gas company or public utility.

SEC. 2. *Policy.* The Commission finds and declares that: (1) Equal employment opportunity for all persons regardless of race, color, religion, sex or national origin is a national policy; (2) the furtherance of that national policy is a matter of the public interest, and

(3) it shall, in each determination under the Federal Power Act or the Natural Gas Act with respect to the public interest, give material consideration to such national policy.

SEC. 3. *Unlawful Employment Practices.* No regulatee shall (1) fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; (2) limit, segregate or classify its employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin; (3) discriminate in admission to, or employment in, any program of apprenticeship, training or retraining, including on-the-job training, on account of an individual's race, color, religion, sex or national origin; (4) discriminate against any employee or applicant for employment because such employee or applicant has opposed any employment practice made unlawful by Federal, State or local law or regulation or because he has in good faith made a charge of such practice or testified, assisted or participated in any manner in an investigation, proceeding or hearing of such practice by any lawfully constituted authority, or (5) print or publish or cause to be printed or published any notice or advertisement relating to employment by such regulatee, indicating any preference, limitation, specification or discrimination based on race, color, religion, sex or national origin, except where a preference or specification is for the purpose of remedying past practices of discrimination.

SEC. 4. *Equal Employment Opportunity Programs. Duties of Management.* Each regulatee shall establish, maintain, carry out and file with the Commission a written equal employment opportunity program, in which the regulatee shall commit itself to each of the following courses of action: (1) Define the responsibility of each level of management to insure a positive application and vigorous enforcement of the policy of equal employment opportunity, and establish a procedure to review and control managerial and supervisory performance; (2) inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and secure their cooperation; (3) communicate the equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis; (4) conduct a continuing campaign to exclude every form of prejudice or discrimination based on race, color, religion, sex or national origin from its personnel policies and practices and working conditions, and (5) conduct continuing reviews of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure genuine equality of opportunity to participate fully in all organizational units, occupations and levels of responsibility.

SEC. 5. *Equal Employment Opportunity Programs. Substantive Content.* Each regulatee shall include in its equal employment opportunity program such specific practices as the following:

(1) To assure nondiscrimination in recruiting: (a) Posting notices in the regulatee's employment offices

informing applicants of their equal employment rights and their right to notify the Federal Power Commission or other appropriate agency if they believe they have been the victim of discrimination; (b) Planning a notice in bold type on the employment application informing prospective employees that discrimination on account of race, color, religion, sex, or national origin is prohibited and they may notify the Federal Power Commission or other appropriate agency if they believe they have been discriminated against; (c) placing employment advertisements in media which have significant circulation among minority groups and females in the recruiting area; (d) recruiting through schools and colleges with significant minority group and female enrollments; (e) maintaining systematic contacts with minority, human relations and female organizations, leaders and spokesmen to encourage referral of qualified minority and female applicants; (f) encouraging present employees to refer minority and female applicants, and (g) making known to all recruitment sources that qualified minority and female persons are being sought whenever the company hires.

(2) To assure nondiscrimination in selection and hiring: (a) Instructing those of the regulatee's staff who make hiring decisions that all applicants for all jobs are to be considered without discrimination; (b) cooperating with unions in the development of programs to assure qualified minority and female personnel equal opportunity for employment and including an effective nondiscrimination clause in new or renegotiated union agreements, and (c) avoiding the use of selection techniques or tests which have the effect of discrimination against minority groups or females.

(3) To assure nondiscrimination in placement and promotion: (a) Instructing those of the regulatee's staff who make decisions on placement and promotions that minority and female employees are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed to determine whether this results from discrimination; (b) giving all employees equal opportunity for positions which lead to higher positions, and inquiring as to the interests and skills of all lower paid employees with respect to any of the higher paid positions, followed by assistance, counseling, and effective measures to enable employees with interest and potential to qualify themselves for such positions, and (c) reviewing seniority practices and seniority clauses in union contracts to insure that such practices or clauses are not discriminatory and do not have a discriminatory effect.

(4) To assure nondiscrimination in other areas of employment practices: (a) Examining rates of pay and fringe benefits for present employees with equivalent duties, and adjusting any inequities found, and (b) advising all qualified employees whenever there is an opportunity to perform overtime work.

SEC. 6. *Annual Employment Reports.* Each regulatee shall, contemporaneously with the filing of its EEO–1 form with the United States Equal Employment Opportunity Commission, file a copy thereof with the Commission.

SEC. 7. *Applicants to furnish equal employment information.* Each applicant for a license, renewal thereof, certificate of public convenience and necessity, rate change, permission to abandon a facility, permission to sell, lease or dispose of a facility, permission to merge facilities or any other permission or author-

ization in which the Commission is charged by law with protecting the public interest, shall include with its application (1) a report indicating the manner in which the specific practices undertaken pursuant to the regulatee's equal employment opportunity program have been applied and the effect of these practices upon the applications for employment, hiring and promotions of minority group members and females; (2) a report indicating whether any complaint has been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the applicant, including the persons involved, the date of filing, the court or agency before which the matter is or has been, the file number (if any), and the disposition or current status of the matter, and (3) a copy of the regulatee's last current EEO–1 form.

SEC. 8. *Affirmative Action Plans satisfactory.* In the case of any regulatee which is required to file an affirmative action plan with the Office of Federal Contract Compliance of the United States Department of Labor or any other Federal agency, a copy of such plan may be filed in lieu of the program required under the provisions of sections 4 and 5 of this rule.

SEC. 9. *Complaints of discrimination.* Any person who believe himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, by himself or by a representative, file a complaint with the Commission. The provisions of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations with respect to the processing of complaints, the conduct of hearings and the issuance of decisions and orders shall apply to complaints filed under this section.

SEC. 10. *Intervention.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, in accordance with the provisions of section 1.8 of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations, participate in any proceeding involving applications for such authorizations or permissions as the Commission may give under statutory or other delegated authority administered by it.

SEC. 11. *Consideration of equal employment information in making public interest determinations and sanctions.* In each proceeding in which the Commission is charged by law with protecting the public interest, including but not limited to applications for licenses, certificates of public convenience or necessity, rate changes, permissions to abandon facilities, permissions to sell, lease or dispose of facilities and permissions to merge facilities, the Commission shall give material consideration to the information required to be provided under the provisions of sections 4, 5, 6 and 7 of this rule, and may deny, delay or condition any such license, certificate, rate change, or permission in accordance with such consideration.

SEC. 12. *Referrals and Deferrals to EEOC.* The Commission may refer any complaint involving a probable violation of any provision of Title VII of the Civil Rights Act of 1964, as amended, to the Equal Employment Opportunity Commission. If duplicate complaints are filed both with the Commission and with the Equal Opportunity Commission, the Commission shall defer jurisdiction and the Equal Employment Opportunity Commission will process the complaint.

SEC. 13. *Proceedings in forma pauperis.* The Commission shall, upon the filing of an affidavit of indigency by any complainant or intervener, provide

reasonable counsel fees and copies of transcripts of hearings without charge.

SEC. 14. *Penalties.* The penalties prescribed for violations of the regulations or orders of the Commission under the provisions of section 21 of the Natural Gas Act and section 316 of the Federal Power Act shall apply to violations of this rule or of orders of the Commission issued pursuant thereto.

SEC. 15. *Court Review of Orders.* Any party aggrieved by an order of the Commission issued pursuant to this rule may apply for rehearing and court review of such order in accordance with the provisions of section 19 of the Natural Gas Act of section 313 of the Federal Power Act.

APPENDIX D

United States of America Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Pinkney Walker.

DOCKET NO. R–447

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

THE NATIONAL URBAN LEAGUE

THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND

THE NATIONAL ORGANIZATION FOR WOMEN

THE WOMEN'S EQUITY ACTION LEAGUE

THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS (IN CALIFORNIA)

THE ASSOCIATION FOR THE BETTERMENT OF BLACK EDISON EMPLOYEES

THE OFFICE OF COMMUNICATIONS OF THE UNITED CHURCH OF CHRIST

THE CENTER FOR COMMUNITY CHANGE

THE AMERICAN G.I. FORUM (IN CALIFORNIA)

THE MEXICAN AMERICAN POLITICAL ASSOCIATION

UNITED NATIVE AMERICANS, INC.

ORDER DENYING PETITION FOR REHEARING

(Issued August 21, 1972)

Petitioners in the above-entitled matter on August 8, 1972, filed a petition for rehearing of Commission Opinion No. 623, Declaratory Opinion and Order on Petition for Issuance of a Rule Relative to Em-

ployment Practices, issued July 11, 1972. Petitioners annex to their petition a letter of Chairman William H. Brown, III, Equal Employment Opportunity Commission, dated July 13, 1972, addressed to the Chairman of the Federal Power Commission.

The assignments of error and grounds for rehearing set forth in the petition, including Chairman Brown's letter, set forth no new facts or principles of law which were not fully considered by the Commission when it issued its Opinion No. 623, or which, having now been considered, warrant any modification of that Opinion. Opinion No. 623 dismissed for lack of jurisdiction a petition filed June 22, 1972.

The Commission further finds:

It is necessary and appropriate for the purposes of the Natural Gas Act and the Federal Power Act, 15 U.S.C. 717o, 16 U.S.C. 825h, 1, to order as hereinafter provided.

The Commission orders:

The petition for rehearing of Commission Opinion No. 623, issued July 11, 1972, is hereby denied.

By the Commission.

[SEAL]

MARY B. KIDD,
Acting Secretary.

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